

# GOOD FAITH AND LAW EVASION

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*Laws imposing sanctions can be self-defeating by supplying incentive and guidance for actors engaged in socially undesirable activities to reshape conduct to evade penalties. Sometimes this is deterrence. But if the new activity, as much as the old, contravenes the legal project's normative stance, it is a failure of law. The problem of evasion warrants response in many fields—not least in criminal law—despite the frequent and oversimplified assumption that legality-related values require narrow prohibitions that unavoidably permit evasion.*

*Three common responses to evasion have serious deficits. Foregoing control of evasion is a mistake if large portions of an activity warranting regulation occur along (and move towards) the margins of a legal rule. Regulating through frequent iteration of narrow rules is costly and may leave law a step behind moving targets. Using broad standards inevitably leads to overbreadth, creating space for mischief in the form of excess enforcement discretion and undeserved sanctions. A fourth approach holds more promise and has eluded treatment in scholarship. Law can proceed more directly by using doctrine designed to identify the evasive actor. I argue that mental-state inquiry is the best way to do this; demonstrate that the law has long engaged in a version of this approach in its use of good faith doctrines; and conclude that a form of good faith doctrine could be further exploited to respond to evasion in criminal and corporate law.*

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## INTRODUCTION

Legal regimes frequently confront problems of evasion. Paradigms for the evasion problem tend to appear in the area of corporate and financial regulation, in which sophisticated and resourceful actors pair with complex law to produce at times maddening and costly games of regulatory cat-and-mouse. One need think only about noteworthy problems in the tax shelter realm and derivatives industry to appreciate the importance of this issue for legal regulation.

Evasion is a general problem for law. All law articulated *ex ante* suffers from the limitations of lawmaker foresight. Theoretical accounts of law often describe this challenge as lawmakers' inability in the face of modernization to fully envision the future in which a law is meant to apply.<sup>1</sup> Continual human advancement guarantees that new behaviors will arise that regulators will lament *ex post* but could not have specified *ex ante*.

The problem is more difficult than that. The act of making a law alters the state of affairs to which the law will apply—only after the law is enacted and in a manner only that particular law could have caused. Laws change behavior. That is often their purpose. However, laws, and the people who make them, cannot fully control the behavioral changes they unleash. A law

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1. See H.L.A. HART, *THE CONCEPT OF LAW* 124–36 (2d ed. 1997); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 31–37 (1991).

can defeat itself by causing people to develop new behaviors designed to avoid its force.<sup>2</sup>

The evasion problem complicates many projects of regulation. Consider criminal procedure, for example. Constitutional and statutory law seek to sanction and deter official behavior that risks undue harm to individual rights.<sup>3</sup> But law enforcement personnel (not to mention government actors in general) are highly knowledgeable about the law and have strong motivation to engineer around the law in the “often competitive enterprise of ferreting out crime,” as well as in other state activities controlled by public law.<sup>4</sup> It is a familiar problem to students of criminal procedure that the more detailed the law of exceptions to the warrant requirement, for example, the more adept police become at steering their investigations into the space created by those exceptions. This can in turn undermine the same values that justify limiting those exceptions.

Or consider the field of attorney regulation. Legal practice in current form, in particular the structure of the adversary process, demands and creates wide space for acceptable argument. Lawyers can exploit that space to engage in conduct that enables harmful behaviors but stands beyond legal control. The controversy over the “torture memos” of the Bush Justice Department is an example of this problem.<sup>5</sup> The memo authors have contended that they genuinely believed their legal arguments to be non-frivolous and within the range of responsible interpretation.<sup>6</sup> Their opponents have argued that the authors knew they were articulating bogus arguments constructed solely to insulate gravely wrong conduct from penalty.<sup>7</sup> The authors look more deserving

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2. See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2391–402 (1997).

3. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2534 (1996).

4. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (footnote omitted); see also Steiker, *supra* note 3, at 2534; Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

5. See W. Bradley Wendel, *The Torture Memos and the Demands of Legality* (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 09-019, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1422603](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422603).

6. Because the exchange goes so directly to the nub of the matter, I must point the reader to one of the memo authors' statements in an interview for a television program that might otherwise be said to lack gravitas. The Daily Show With Jon Stewart, *Exclusive—John Yoo Extended Interview Pt. 1* (Jan. 7, 2010), <http://www.thedailyshow.com/watch/thu-january-7-2010/exclusive---john-yoo-extended-interview-pt-1>.

7. For extensive analyses of the memo authors' intellectual honesty by Brian Tamanaha, Jack M. Balkin, and others, see Marty Lederman, *The Anti-Torture Memos: Balkinization Posts on Torture, Interrogation, Detention, War Powers, Executive Authority, DOJ and OLC*, BALKINIZATION (July 8, 2007), <http://balkin.blogspot.com/2005/09/anti-torture-memos-balkinization-posts.html>. See also Editorial, *The Torture Lawyers*, N.Y. TIMES, Feb. 25, 2010, at A32 (asserting that the memo authors “were not acting as fair-minded analysts of the law but as facilitators of a scheme to evade it”).

of sanction in the latter case than the former. But the space created by the law and norms of attorney regulation may allow them to present themselves as falling in the latter category even if in truth they belong in the former.

Perhaps contrary to instinct, this problem both arises in and sometimes warrants a response in the criminal law. One might think that the evasion problem would unfold as follows in the criminal context: Commitment to legality principles—chiefly the right to adequate notice and the need to control enforcement discretion—demands specificity and narrowness in criminal prohibitions. Narrow and hard-edged rules of law create space for evasion. Therefore, the evasion of criminal laws is just something with which we must live.<sup>8</sup>

This is an overly simplistic account of the relationship between criminal law and evasion. Generality in penal laws and judicial construction of such statutes are substantially tolerated and arguably must be.<sup>9</sup> As I have demonstrated elsewhere, the industriousness and determination of some types of criminal actors, coupled with their rejection of normative constraints, produces some of the demand for broad and flexible statutory prohibitions.<sup>10</sup> Indeed, as I have shown, some offenses—fraud and obstruction of justice, for example—are best understood at their cores as prohibitions on forms of evasion.<sup>11</sup> The problem of evasion in criminal law is not, in fact, just to be lived with. It is to be grappled with in the way that problems of important competing interests in the law require.

In general, law can respond to evasion in four ways. First, law can take a rule-based approach, prohibiting specific iterations of undesirable behavior and continually updating itself as new forms of behavior arise. Sometimes this approach is adequate. But in many contexts, it will be ineffective and overly costly because the law remains continually one step behind innovation.<sup>12</sup> This approach also risks encouraging regulated actors to adopt a normative orientation toward the law that is undesirable in some contexts: the

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8. The idea of legality “principles” or “values” represents a complex and contestable category of ideas that I do not wish to nail down here. My working assumption is that these values include some degree of commitment to fair notice and control of enforcement discretion, implemented through doctrines such as vagueness limitations and ex post facto prohibitions.

9. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196–212 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 346–49; Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67–75 (1960).

10. Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008).

11. Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971 (2006).

12. See Richard A. Epstein & M. Todd Henderson, *Marking to Market: Can Accounting Rules Shake the Foundations of Capitalism?* (Univ. of Chi. Law & Econ., Olin Working Paper No. 458, Apr. 15, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1385382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1385382).

attitude of the loopholer, who treats a legal regime as an object of gamesmanship rather than respect.

Second, law can eschew control of evasion, satisfying itself with sanctioning just those who operate in the core of an area of regulation and leaving alone those who operate around the area's margins. This approach will be satisfying only if most of the social problem that motivates the project of regulation (a form of harmful polluting, a kind of blameworthy violation of another's rights, and so on) is produced by actors falling within the core and not along the margins of a legal rule. This depends on context. A legal rule's defined core does not necessarily correlate with the space occupied by actors producing the relevant social harm. Better law design may produce better correlation, but law is a human technology with many limitations. And the incentive to evade, of course, will tend to push actors bent on undesirable behavior away from the core and toward the margins.

Third, law can choose to speak very generally, in the form of broad prohibitions designed to cover all possible forms an undesirable behavior might take. Such prohibitions unfortunately almost always turn out to be overbroad, risking overdeterrence of desirable conduct and punishment of undeserving actors. This approach thus requires some reliance on enforcers, when examining individual cases *ex post*, to limit application of an overbroad law to those cases genuinely implicating the social problem that gave rise to the law. Many find such reliance on discretion unappealing, especially in the criminal justice system.

The contrast between the third approach (overbreadth) and the first one (continual updating of rules) has of course been much discussed in the literature on rules versus standards.<sup>13</sup> That discussion has developed the comparative virtues and deficits of narrow rules and broad standards, but it has not adequately dealt with the problem of how rules inevitably produce new behaviors, in turn producing pressure to abandon rules and embrace standards.<sup>14</sup> Nor

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13. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 139–41 (1994); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 *J. LEGAL STUD.* 257, 258–61 (1974); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1687–1701 (1976); Pierre Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379, 381–90 (1985); see also Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in *OXFORD HANDBOOK ON LANGUAGE AND LAW* (Lawrence Solan & Peter Tiersma eds., forthcoming 2011), available at <http://ssrn.com/abstract=1651465> (explaining how vagueness in law imposes costs, but those costs are an unavoidable price of obtaining essential benefits of stating law generally).

14. Ehrlich and Posner, for example, equate the problem of loopholes in legal rules with underinclusion. Ehrlich & Posner, *supra* note 13, at 269, 275 & n.24. The concepts are not the same, at least as I think they are profitably understood. Underinclusion describes mismatch between the terms of a law and its objectives, which can result from bad drafting, the limitations of language, or deliberate

has the importance of that discussion to the field of criminal law been fully appreciated.<sup>15</sup>

Thus the importance of a fourth and more direct approach. What if law attacked the problem of evasion by bolstering primary rules of law with supplemental doctrine designed to identify evaders? The availability of such an approach might be independent of the selection of broad versus narrow primary rules. A project of regulation could pursue a rule-based approach but supplement it with a doctrine authorizing sanction of actors who seek to evade the rules. For example, lawmakers might ban the production of a list of known harmful substances but also ban the production of equivalently harmful substances designed to avoid the ban's list. Or a regulatory project could pursue a broad, standard-based approach but supplement it with a doctrine exempting from sanction actors who do not set out to undermine the legal regime. For example, lawmakers might prohibit all forms of obstruction of legal process but afford a defense to actors whose conduct was meant or understood to conform to norms of acceptable adversarial behavior.

I argue that the best route to identifying evasion, especially but not only in the application of criminal law, is through inquiry into an actor's mental state. The attitude of a regulated actor toward a legal regime is what identifies that actor as an evader in the way that ought to concern the law. Actors who do not designedly exploit the gaps in law, even if falling within those gaps, do not as a class pose the same threat to projects of behavior control (and do not impose the same costs on such projects) as actors who display a commitment to pursuing objectives they know to be socially unwelcome.

Though mental-state inquiries tend to be demanding and are perforce underinclusive when applied through evidentiary processes, the best answer to the concern that it is simply too costly and difficult for law to chase the inevitable phenomenon of evasion is to offer incremental and careful alternatives for doing so. The law, as it turns out, possesses a well-worn tool for conducting mental-state inquiry designed to identify evasive actors. Good faith doctrines (and the related concept of bad faith) perform this function in many, but

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lawmaker choice. Loopholes are spaces that actors reveal through *new* behaviors that *render* law underinclusive in ways lawmakers did not foresee and may have been unable to foresee.

15. Others have observed that the important question for many projects of law design is not one of rules *versus* standards but rather one of what sorts of rules, backed by what sorts of standards. See, e.g., William W. Bratton, *Enron, Sarbanes-Oxley and Accounting: Rules Versus Principles Versus Rents*, 48 VILL. L. REV. 1023 (2003); Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411 (2007); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

certainly not all, areas of law in which they operate.<sup>16</sup> I will demonstrate this about the doctrine, supply the theoretical framework that remains missing despite the doctrine's long history, and explain how good faith doctrine could be further and more clearly exploited to deal with some evasion problems that bedevil criminal and corporate law.

My argument unfolds as follows. In Part I, I explain the form of the evasion problem in more detail, demonstrate how mental-state inquiry responds to that problem, and explain what I mean by a state of mind having to do with efforts to evade law. In Part II, I show examples of law using good faith doctrine to combat evasion. The examples come principally from the field of contract law, which is not my area of normative concern but still supplies an illuminating setting for seeing the idea at work in positive law. In Part III, I demonstrate how good faith doctrine is used to deal with evasion in criminal and corporate law. I take a more normative stance, explaining how the doctrine could be further exploited to manage unavoidable tensions in these areas.

With a full view of positive law, in Part IV I turn to the central question that my findings have raised: What are the conditions under which it is worth it for the law to take on evasion, and specifically to do so through the vehicle of mental-state inquiry? I offer several insights in terms of cost-benefit analysis, which must be somewhat tentative given that this is a first entry into the area of controlling evasion through mental-state doctrine. The chief insight is that evasion—though lending itself quite well to general theorizing—becomes a deeply contextual matter when one arrives at the question of what to do about it. Efforts at evasion control are desirable only if the primary legal regime instantiates strong and relatively uncontroversial commitments about what is socially desirable. Not surprisingly—and many who categorically eschew purposive approaches to legal interpretation will disagree here—I believe that law's underlying social objectives are determinable in many (but far from all) contexts.

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16. The meaning of good faith varies with legal context, as with other versatile tools like reasonableness or duty. The use of good faith explored in this Article is more conceptually precise than its frequent use simply to denote conduct that lacks a higher degree of fault. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (holding that the question of whether prison officials used excessive force in violation of the Eighth Amendment involves an inquiry as to “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm,” which in turn requires considering “the need for application of force, the relationship between that need and the amount of force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to temper the severity of a forceful response’” (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986))); Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PriceWaterhouseCoopers, LLP, 989 A.2d 313, 335–39 (Pa. 2010) (holding that the in pari delicto defense to liability of an outside auditor is available if the auditor acted in good faith, even if also negligently, but not if the auditor engaged in “secretive, collusive conduct” with insiders).

## I. THE EVASION PROBLEM

In this Part, I describe the formal qualities of two things: the dilemma of evasion of regulatory efforts and inquiry into mental state as a legal response to that dilemma. This description unfolds in two steps. The first step is to illustrate the evasion problem and its relationship to mental state with simplified hypothetical situations—one dealing with evasion through alteration of conduct and the other with evasion through alteration or concealment of mental state. The second step is to explain the evasive state of mind in terms of conventional doctrine of mental state.

### A. Forms of Evasion

#### 1. Regulating Action

Assume that a benevolent social planner, according to whatever criteria one might deem appropriate, has accurately identified a behavior as unwelcome and needing sanction. In designing a legal rule to sanction that behavior, the planner seeks a fit between the coverage of the law and the scope of the relevant conduct. For instance, the planner might want to impose a fine for discharging into the environment substances that make water supplies unhealthy to drink. She might accomplish this by making a list of harmful substances and including them in the dumping ban.

Even if the planner correctly identifies all such harmful substances *ex ante*, this approach might not be effective. Dumpers could alter the composition of substances in response to the ban in order to fall outside its scope. The planner might respond to acquisition of new knowledge, and new efforts to evade the ban, with updates to the list of banned substances. But this approach might be costly and leave regulation continually one step behind harm-producing activities. Depending on the state of technology in the regulatory context, the approach might have no end.

Another option for the planner, of course, would be to adopt a broad ban, worded in terms that track the relevant social problem. She might ban something like “all dumping that makes water supplies unhealthy.” But this approach is likely to be undesirably overbroad. A concept like “unhealthy” is highly flexible, and enforcers and adjudicators might apply the concept to activities that are only slightly unhealthy, when the planner’s objective was to sanction only dumping that posed costly public health threats.

The social planner, therefore, might be attracted to a third option. The planner could couple either the overly narrow or the overly broad approach

with a doctrine that expands or contracts liability in the sanctioning process *ex post*. Using the pollution example, she might say to herself, “I would like to be specific about the prohibited substances but make sure there is authority also to sanction the actor who discharges a substance that is harmful and designed to avoid the prohibited list.” Alternatively, she might say to herself, “To prevent actors from altering substances to get around the ban, I would like to be somewhat vague about the prohibited substances, but I want to make sure there is authority to exempt from sanction the actor who does not try to accomplish harmful dumping while avoiding sanction.”

Doctrine—whether by statute, rule, or judicial construction—can be shaped either way. If the ban says something like “Do not discharge any of this list of substances harmful to health, or otherwise discharge in an effort to subvert this ban,” the law gives a tribunal (or enforcer exercising discretion) authority to sanction (or charge) an actor who alters the composition of a substance to avoid paying the fine for dumping it. If the ban says something like “Do not discharge substances harmful to health,” while affording a defense to actors who do not seek to subvert the effort to protect water supplies, the law gives a tribunal or enforcer authority not to sanction or charge an actor who discharges a novel substance that the actor did not create in order to avoid the ban. The novel substance may still be harmful, and its harmfulness may make the substance problematic for the effort to regulate water supplies. But it will not be problematic in the particular way that evasion is problematic: as the product of an actor who devotes effort and resources to thwarting law from achieving its objectives.

## 2. Regulating Mental State

Consider another common approach for a social planner. She might define the undesired behavior not just in terms of conduct but also in terms of mental state. Shifting to a different hypothetical, suppose a regulation prohibits a person from filing a lawsuit “with intent to harass the defendant.” The law’s use of the mental state of intent narrows what would otherwise be a broader rule like a ban on filing “any suit without merit.” This perhaps makes the rule fit better with the subset of cases for which sanctions are believed to be justified on deterrent, retributive, or other grounds. In addition, the planner has been able, at least in part, to stick with a prohibition that broadly defines conduct eligible for sanction, while at the same time avoiding the problem of actors evading a narrow regime specifying particular kinds of undesirable lawsuits.

But the evasion problem persists, in different form. Actors can conceal and alter mental states in response to rules that prohibit engaging in actions with

specified states of mind. A familiar instance of this problem is the relationship between the doctrine of willful blindness and rules that sanction actors with mental states of knowledge. For example, if lawmakers say, “Do not knowingly file a suit that lacks merit,” an actor (especially one in a position of power and control that sanctioning projects often like to reach) might deliberately avoid exposure to facts that would cause that actor to have legally operative knowledge.<sup>17</sup> Willful blindness doctrine attempts to block this dodge by treating avoidance of knowledge, if the actor’s conduct includes sufficiently telling measures, as legally equivalent to knowledge.<sup>18</sup>

Preventing this kind of mental-state engineering is harder with rules that rely on intentional states of mind. A person who is told that she can be sanctioned for purposefully filing a suit to harass might assert that her purpose in suing is to obtain relief and that she cannot be sanctioned because she did not set out to harass the defendant. Many legal regimes must deal with individuals who proffer a different form of intent than the one that is subject to sanction. Think, for example, of laws prohibiting discrimination in employment decisions or jury selection.<sup>19</sup>

This problem of evasion of intent rules presents an interesting theoretical and empirical question. Do such cases simply require a determination of the actors’ veracity? Or do such cases, as in the problem of knowledge and willful blindness, sometimes involve actors who engineer their *true* mental states to avoid liability? This challenging problem of psychology may not be of great practical consequence. Either way, such an actor is engaged in an effort to circumvent the regulatory project, and the social planner will want to consider available means to prevent such circumvention. In any case, the problem of discovering and proving mental state is equally difficult and equally dependent on inferences from observed behavior rather than direct observation of the “true” mind.

Doctrine can assist with the evasion problem that involves an actor’s alteration or concealment of mental state. A lawmaker could supplement a rule defined in terms of conduct undertaken with a particular purpose by also saying that the actor must genuinely lack the prohibited purpose. I delve into actual doctrine in Part II, but let us assume for now that the legal terms good faith or bad faith could stand for this concept. Suppose a plaintiff asserted that she filed her suit not intending to harass the defendant but with the purpose

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17. Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 425–30 (2007).

18. See *United States v. Black*, 530 F.3d 596, 604 (7th Cir. 2008); *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990).

19. See, e.g., 42 U.S.C. § 2000e-2 (2006); *Batson v. Kentucky*, 476 U.S. 79 (1986).

of vindicating a position she believed just. Her assertion of intent would be deemed to be in bad faith, or not in good faith, if she fabricated it or if she formed it, at some point along the way, with an eye on avoiding the sanctioning regime.

What is the difference in this example between saying that the plaintiff had the “intent to harass” and that she filed the suit “in bad faith”? The bad faith plaintiff does not just decide to harass the defendant and then run off and file a lawsuit in order to do so. She starts off wishing to harass the defendant. But then she thinks about the prohibition on harassing lawsuits and constructs a story about her purpose in filing suit, which is designed to insulate her from sanction under the rule against harassment. In addition to intending to harass the defendant, she is dishonest about her asserted, non-sanctionable purpose.<sup>20</sup>

The degree of the bad faith plaintiff’s dishonesty might vary. She might be baldly lying. Or she might say to herself, “I know I really want to harass the defendant, but I could make this argument about the merits of my case that would pass the laugh test, and if I can do so while keeping a straight face, then maybe I really do have a permissible purpose.” In any case, she endeavors to circumvent a regime that is designed to prevent harassing lawsuits, and a social planner might want to ensure that the sanctioning regime covers her behavior. One means of doing so would be a prohibition on her acting in bad faith.

#### B. Evasive State of Mind

“Evasion” of course does not appear in the law’s standard mental-state hierarchy.<sup>21</sup> Nonetheless, there is a common understanding about evasion that is used in legal and non-legal contexts. Here I join that common understanding with conventional mental-state concepts. The evasive state of mind is a special form of purpose or intent. The evader of legal obligation acts intentionally and does so with respect to the relationship between her conduct and a legal regime. In this Subpart, I explain this form of intent and then distinguish it from other states of mind.

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20. Perhaps it would be useful, therefore, to think about good faith in terms of sincerity, rather than (according to some common definitions of good faith) in terms of the broader concept of honesty. See Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHIL. (forthcoming 2011) (defining sincerity, defending its possibility in the realm of public reason, and distinguishing it from motivation).

21. The most influential expression of this scheme is the Model Penal Code. MODEL PENAL CODE § 2.02 (1985). I draw my definitions from there.

### 1. What the State of Mind Is

To determine whether an actor has a state of mind required for violation of a law, one must first identify the matter toward which the mental state is required. Suppose a jurisdiction's criminal burglary prohibition includes a knowledge requirement and a requirement that the structure entered be a dwelling. One would need to know whether the rule requires that a violator have known only that she entered a structure or also that the structure she entered was a dwelling.

A common understanding of evasion is that it involves something like violating the "spirit" of the law.<sup>22</sup> The spirit of a law can be described more particularly as the social benefit that those who made the law sought to accomplish: less of a particular harm or cost, sufficient punishment for actors who deserve it, and so on. The evasive actor directs her mental state toward the social objective underlying the law. But the evasive actor does not particularly care about that social objective. She is not out to poke the lawmaker in the eye just for the sake of it. What she cares about is accomplishing, for her own reasons, an end that is socially undesirable without suffering sanction for it. Saying that an evasive actor has a mental state toward the spirit of the law means that she holds a state of mind about achieving an end that lawmakers, or the legal regime beyond the letter of any particular rule, do not wish her to achieve.

A concession is in order, of course. One cannot describe an actor as having a mental state toward something that does not exist. If the spirit of the law—that is, a social objective underlying a liability regime—cannot be identified (or perhaps never existed), then there can be no bad faith actor in the way I have described. Sometimes locating the spirit of the law will be difficult, thus frustrating the inquiry; much of the time it will not be so hard. Understanding and applying rules of law consistently with their purposes is a familiar practice for legal institutions.<sup>23</sup> If it is possible to identify regulatory purposes with reasonable confidence in some circumstances, then responding to the evasive actor with inquiry into mental state is also a feasible project.

Does agreeing with me require membership in a purposivist school of legal interpretation?<sup>24</sup> Perhaps methodologically but not normatively. A normative

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22. See Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 508–11 (2003).

23. See FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 158–67 (2009).

24. Though the matter can be a good deal more complicated than this, one can generalize that a purposivist interpretive method, often contrasted with a textualist method, seeks to construe the words of a legal rule in a manner that furthers the general objectives sought to be achieved by those who crafted

critique of purposivist methods of interpretation is that they can subvert the legislative process and violate separation-of-powers principles by undoing compromises and minority reservations embodied within statutory language.<sup>25</sup> But, to explore the problem of regulating evasion, I am positing situations in which legislatures *instruct* legal actors to engage in purposivist interpretation—either by enacting intentionally overbroad prohibitions or by supplementing narrower prohibitions with doctrines (like a rule against bad faith) designed to cover additional conduct that implicates a regime’s purposes.<sup>26</sup> In such a context, any criticism of purposivism rests on its empirical capacity, not its political credentials. In addition, as noted earlier, there will be a wide range of lawmaking scenarios in which it is practical to discern the purposes of a law.<sup>27</sup>

To describe further the evasive actor’s mental state, it is necessary to move from the issue to which that mental state is directed (which one might call the “object inquiry”) to the degree of the actor’s mental state (which one might call the “level inquiry”). In common parlance, the evasive actor is one whose project is to get around the law. She seeks to avoid sanction while engaging, in substance, in the very sort of behavior that the law means to price or punish. To act in bad faith is to act with the loopholer’s state of mind.<sup>28</sup> The loopholer consciously uses technical compliance with a legal regime as a means of producing the wrong the regime is meant to block or punish, while avoiding the legal consequences of that violation.

Using the standard definition of purpose or intent in criminal law, the evasive actor has the “conscious object”<sup>29</sup> to contravene the spirit of the law. It

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the rule. See, e.g., Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 732–34 & n.2 (2010).

25. See John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70 (2006).

26. See, e.g., Pub. L. No. 111-152, § 1409(a), 124 Stat. 1067 (to be codified at 26 U.S.C. § 7701(o)) (codifying judicial doctrine that otherwise tax-compliant transactions will be invalidated for tax purposes if found to lack genuine economic substance, defined as objective economic substance and subjective business purpose). Such a scenario differs markedly from the kind of example often used to illustrate how purposivist theory might justify essentially rewriting statutes. See Manning *supra* note 25, at 105 (discussing how purposivist theory might be used to interpret a statute prohibiting only “dogs” in the park as also prohibiting pigs, on the argument that the legislature meant to prohibit all disruptive animals).

27. As John Manning carefully describes (and, as a textualist, concedes), even textualist methods of interpretation take policy objectives of a law into account, whether or not practitioners of those methods believe those objectives can be linked in any meaningful way to the collective or individual mental states of the group of legislators who voted on the law. Manning, *supra* note 25, at 79–85.

28. See Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 137–41 (1997).

29. MODEL PENAL CODE § 2.02 (1985).

is essential to distinguish this mental state from considerations of motive.<sup>30</sup> An actor is an evader if she wishes to engineer around the law in order to accomplish her objective, whatever that might be—saving money, avoiding deserved punishment, preventing additional regulatory scrutiny, and so on. If the evasive actor could assert that she was not an evader because, for example, she acted to save money and not to subvert the law, then the category of evasive actors would be nearly an empty set.<sup>31</sup>

Criminal law doctrine would classify the evasive mental state as a form of “specific intent.”<sup>32</sup> Consider a statute that makes it a crime to “knowingly assault a law enforcement officer with the intent to impede her in the performance of her duty.” A simple assaulter does not violate this statute. An assaulter who knows that the victim is an officer does not violate this statute. Even an assaulter who knows that the victim is an officer and that the assault will impede her performance does not violate this statute. The violator must desire that the officer be impeded, but the violator’s reason for wishing to impede the officer (to help an accomplice escape or to protest military action, for example) is irrelevant to liability. Likewise, the evader of a legal rule has the specific intent not to thwart the law per se but to achieve the end that the law is designed to prevent her from achieving while avoiding sanction for doing so.

Note that there is potential for interactive effect between this concept of specific intent to evade the law and the nature of any intent element in an underlying rule of liability. The more a mental-state element of purpose encompasses reasons for action, the more it can sort cases according to justifications for sanctioning. Examples of purpose requirements that do this kind of sorting work include the intent to defraud, the intent to violate a person’s civil rights, and the intent to obstruct justice.<sup>33</sup> As I discuss when addressing white-collar crime in Part III, purpose requirements tend to be thicker and more closely approach concepts of motive where law tries to identify unwanted

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30. The old saw that motive is irrelevant to criminal liability is false. See, e.g., Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 89–90 (2006). The issue is whether the definition of an offense makes motive relevant and, if so, just how.

31. See *United States v. Aaron*, 590 F.3d 405, 409 (6th Cir. 2009) (explaining that the good faith defense to a charge of willfully making a false tax return applies to an actor who is unaware of the illegality of his conduct, not to an actor who asserts a benign motive for his clear-eyed choice to violate tax law).

32. The term is unfortunately confusing because it has been used to mean different things. It at least (and most helpfully) refers to purposes that are separate requirements for liability that do not attach to the actions in which an actor must engage to violate a prohibition. JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 156–57 (4th ed. 2007); see, e.g., *United States v. Fekete*, 535 F.3d 471, 476–77 (6th Cir. 2008) (discussing the specific intent element in the federal offense of carjacking).

33. See 18 U.S.C. §§ 242, 1348, 1503 (2006).

behaviors nested within socially desirable activities like aggressive marketing, industrious policing, or zealous litigation.

But the more a purpose element encompasses reasons for action, the more opportunities the rule leaves for evasion. Actors can construct reasons, supplement them, mix them, substitute them, control their relative strengths, and hide them. Saying that an actor must proceed in good faith, or must not proceed in bad faith, is a way for a legal regime to make clear that actors may not exploit purpose elements in rules of liability. Such a rule takes the purpose inquiry up one level: If an actor's intention in forming a particular purpose is to present herself as lacking the legal rule's sanctionable purpose, then the actor is nonetheless subject to sanction under the rule.

## 2. What the State of Mind Is Not

Distinguishing the evasive state of mind from several other mental states should clarify it further. The actor who proceeds with the specific intent to contravene the spirit of the law is not merely negligent. She is not merely reckless. She has more than just knowledge. And she is different from an actor who seeks to rely on a claim of mistake of law.

She is not merely negligent because negligence, as a mental state, is primarily absence of thought. It is the failure to be aware of a relevant risk of which a reasonable person would have been aware (here, I suppose, the risk that the actor's conduct constitutes evasion).<sup>34</sup> An actor who engages in deliberate behavioral design in relation to a legal rule cannot also be an actor who fails to perceive a risk that her conduct skirts that rule.

Nor is the evasive actor reckless or knowing. The reckless actor knows of a relevant risk and chooses to disregard that risk by acting in the face of it.<sup>35</sup> Recklessness is a form (or degree) of knowledge, which is awareness or belief in a matter. For present purposes, recklessness and knowledge can be treated together. An actor's awareness that her conduct skirts (or risks skirting) the legal rule in a manner that produces (or risks producing) the undesirable end is not sufficient to establish that she is an evader. The problem motivating this study's inquiry is behavioral design efforts that respond to a legal regime—not undesirable conduct that happens to fall outside the regime, even if the actor engaging in that conduct realizes it. A rule identifying as an evader one who is merely aware that her conduct undermines the law will be overinclusive if the objective is to deal with actors who redesign behavior in response to legal rules.

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34. MODEL PENAL CODE § 2.02 (1985).

35. *Id.*

A final point of distinction. Anti-evasion doctrines should not be confused with doctrines that deal with defenses of mistake of law.<sup>36</sup> The two legal tools arise from similar normative concerns but represent opposite sides of a coin. A rule sanctioning actors who arguably conform to the letter of the law but do so in a bad faith effort to undermine the law expands liability to include actors who engage in a form of thinking about the law that is deemed, in the context, undesirable.

Mistake of law doctrines deal with actors who violate the letter of the law but nonetheless assert as a reason for mitigating sanction that they either did not think about the law or tried to think responsibly about the law and got it wrong. The law deals with such persons in one of two ways. Either it says too bad (“ignorance of the law is no excuse”) because recognition of the defense might encourage legal ignorance and could lead to inequities in punishment.<sup>37</sup> Or, much less frequently, the law affords the defense but only because the area of regulation is exceptionally surprising or complex, meaning that the actor deserves sympathy for her ignorance or mistake.<sup>38</sup>

As Dan Kahan has explained, when determining who should benefit from mistake of law doctrine, the law often attends to the question of whether an actor is a strategic evader or a responsibly compliant person who just got it wrong.<sup>39</sup> When the Supreme Court held, in the most famous current decision on mistake of law, that a tax protester was entitled to argue to a jury that he was mistaken in thinking that wages were not taxable income, the Court was explicit that his claim would make out a defense to tax evasion only if he could establish that his belief about the law was held “in good faith.”<sup>40</sup>

When lawmakers choose to include an anti-evasion doctrine like a rule barring bad faith or requiring good faith, they are going beyond stating that claims of legal mistake will be unavailing—to assert that exploitation of the terms of the law will be sanctionable. Consider another important Supreme Court decision about knowledge of the law. The Court held that a man could not be prosecuted for evading financial reporting laws by making a series of small bank deposits without proof that he knew that such transaction structuring

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36. See Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction*, 3 CRIM. L. & PHIL. 213 (2009) (describing and analyzing concepts relating to mistake of law).

37. See *Lambert v. California*, 355 U.S. 225 (1957); *People v. Marrero*, 69 N.Y.2d 382 (1987); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 382–87 (2d ed. 1960); OLIVER WENDELL HOLMES, *THE COMMON LAW* 41 (1881).

38. See, e.g., *Cheek v. United States*, 498 U.S. 192 (1991) (recognizing the claim of mistake as a potential defense to tax evasion).

39. Kahan, *supra* note 28, at 142–44.

40. *Cheek*, 498 U.S. at 202.

was also illegal.<sup>41</sup> An effect of such a decision is to encourage legislators to be more explicit in efforts to combat evasion. If Congress had chosen, in the first instance, a rule requiring reporting and prohibiting evasion of the reporting provision, rather than a law prohibiting just the specific practice of structuring, the problem in that case might have been avoided.<sup>42</sup>

## II. ILLUSTRATIONS FROM CONTRACT LAW

Given the foregoing theoretical picture of the evasion problem and the use of mental-state inquiry in response, one should expect to see evidence of the dynamic in existing law. In this Part, I describe two examples in which positive law follows the pattern described by deploying the doctrinal concepts of good faith and bad faith. My purpose is to illustrate and support my thesis as a descriptive matter. The examples come from contract law, where the importance of evasion may be relatively low.<sup>43</sup> In Part III, I turn to regulatory problems that are, from my perspective, more pressing and thus warrant a more normative stance.

### A. Duty of Performance in Good Faith

The most familiar place for the term “good faith” is the law of contracts. The concept has roots in Roman and canon law, where it arose early in the law’s construction of obligations controlling commercial interactions.<sup>44</sup> Roman and canon law imposed an obligation to deal honestly, forthrightly, and

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41. *Ratzlaf v. United States*, 510 U.S. 135, 136–37 (1994).

42. The prosecutor would have to prove a general intent to evade reporting requirements but not specific knowledge of what the law said about any particular means of evasion.

43. Examples from other areas of law could serve the same purpose. These might include, among others: aspects of good faith purchaser doctrines, *see, e.g.*, U.C.C. § 1-201(9) (2004), Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 49–55 (1995); Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 *J. LEGAL STUD.* 43, 58 (1987); doctrines about bad faith litigation conduct leading to an award of attorneys’ fees to a defendant, *see, e.g.*, *F.D. Rich Co., Inc. v. Indus. Lumber Co., Inc.*, 417 U.S. 116, 129 (1974); *Fritz v. Honda Motor Co., Ltd.*, 818 F.2d 924 (D.C. Cir. 1987); *Lipsig v. Nat’l Student Mktg. Corp.*, 663 F.2d 178, 181–82 (D.C. Cir. 1979); or the rule under the Uniform Fraudulent Conveyance Act that a debtor’s transfer will not be invalidated if it was made for “fair consideration,” determined in part by asking whether the transferee took in good faith, that is, without intent to hinder or defraud creditors, UNIF. FRAUDULENT CONVEYANCE ACT § 3 (1978); *see also* Note, *Good Faith and Fraudulent Conveyances*, 97 *HARV. L. REV.* 495, 496–500 (1983).

44. *See, e.g.*, Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith’s Unnatural History*, 72 *TEX. L. REV.* 1317, 1319, 1324–25 (1994); Simon Whittaker & Reinhard Zimmermann, *Good Faith in European Contract Law: Surveying the Legal Landscape*, in *GOOD FAITH IN EUROPEAN CONTRACT LAW* 16–17 (Reinhard Zimmermann & Simon Whittaker eds., 2000).

faithfully with one's commercial counterpart in both negotiation and performance.<sup>45</sup> As applied, the concept granted equity-like authority to courts to modify agreements *ex post* in the interests of justice.<sup>46</sup> Modern counterparts to this concept can be found in civil law systems—the German idea of *treu und glaupe* (roughly meaning loyalty and sincerity towards one's counterpart),<sup>47</sup> or the French notions of obligations to strive to reach agreement and to make affirmative disclosures to one's adversary.<sup>48</sup>

In common law systems, good faith has a narrower role.<sup>49</sup> While there is no general duty to negotiate in good faith,<sup>50</sup> the Restatement of Contracts and the Uniform Commercial Code impose an obligation to perform in good faith.<sup>51</sup> There is debate in the field about how to define good faith and the optimal method of enforcing it.<sup>52</sup> There is general agreement, however, that

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45. See 5 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 79–81 (2d ed. 1937); J.F. O'CONNOR, *GOOD FAITH IN ENGLISH LAW* 8 (1990); James Gordley, *Good Faith in Contract Law in the Medieval Ius Commune*, in *GOOD FAITH IN EUROPEAN CONTRACT LAW*, *supra* note 44, at 94; Martin Josef Schermaier, *Bona Fides in Roman Contract Law*, in *GOOD FAITH IN EUROPEAN CONTRACT LAW*, *supra* note 44, at 63, 67–68, 77–78; Whittaker & Zimmermann, *supra* note 44, at 16–18.

46. O'CONNOR, *supra* note 45, at 2; Jerry, *supra* note 44, at 1321–22, 1325; Whittaker & Zimmermann, *supra* note 44, at 16.

47. John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1044–45, 1069 (1976); Whittaker & Zimmermann, *supra* note 44, at 16–20, 30–31.

48. O'CONNOR, *supra* note 45, at 94–98; Whittaker & Zimmermann, *supra* note 44, at 32–39.

49. Jerry, *supra* note 44, at 1330–31.

50. STEVEN J. BURTON & ERIC G. ANDERSEN, *CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT* 330–31 (1995); O'CONNOR, *supra* note 45, at 18; see Richard E. Speidel, *The "Duty" of Good Faith in Contract Performance and Enforcement*, 46 J. LEGAL EDUC. 537, 539–40 (1996). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1979). For exploration of exceptions and qualifications to the lack of a general duty to negotiate, see E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

51. U.C.C. § 1-304 (2004); RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 49, § 205. Parties generally cannot negotiate away this obligation. See, e.g., *Indus. & Gen. Trust v. Tod*, 73 N.E. 7, 9 (N.Y. 1905). See generally U.C.C. § 1-302(b) (2004).

52. Compare Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 831–32 (1982) (arguing against defining bad faith performance in economic terms and contending that bad faith can be defined only as a diverse collection of behaviors determined undesirable through the common law process), Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 215 (1968), and E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 668 (1963) with Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 394–402 (1980) (arguing that bad faith performance should be defined, in economic terms, as a party recapturing an opportunity foregone at the time of contracting, without paying for such an opportunity), Teri J. Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith From (Some) Contracts*, 84 OR. L. REV. 227, 230–31 (2005), Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 1067–68 (1992), Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 620–21, 650–52, Victor P. Goldberg, *Discretion in Long-Term Open Quantity Contracts: Reining in Good Faith*,

the purpose of good faith doctrine is to give effect to the parties' aims at the time they entered into the deal in order to facilitate contracting and avoid costly defensive measures.<sup>53</sup> Decisions finding violations of this duty arise in two contexts relevant to this Article: a party's exploitation of a contractual term to take advantage of another, and abuse of discretionary provisions in which parties agree not to specify performance in concrete terms.<sup>54</sup>

A good example of bad faith exploitation of a contractual term comes from Judge Richard Posner's opinion in *Market Street Associates Limited Partnership v. Frey*.<sup>55</sup> Party A sold properties to Party B, which leased them back to A. The contract afforded A the right to request that B finance any substantial improvements to the properties. If negotiations broke down, A was entitled to buy the properties back for the original sale price plus six percent annually. A thus could repurchase the properties below market if the properties appreciated by more than six percent annually and financing negotiations failed.<sup>56</sup> Twenty years later, with the properties having appreciated by more than six percent annually, A requested financing for improvements from B without calling B's attention to the provision giving A the right to repurchase if negotiations collapsed.<sup>57</sup>

Judge Posner explained that an obligation of good faith does not make a party a fiduciary for her counterparty; good faith is not altruism or complete candor.<sup>58</sup> Rather, a good faith obligation bars one from taking "deliberate advantage of an oversight by [a] contract partner concerning his rights under the contract."<sup>59</sup> The duty to act in good faith prevents "sharp dealing" and "opportunistic behavior."<sup>60</sup> The point of the doctrine is to give the parties

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35 U.C. DAVIS L. REV. 319, 320–21 (2002), and Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1228–30, 1255–56 (1999).

53. See U.C.C. § 1-304 official cmt. ("[T]he doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached."); U.C.C. PEB Commentary No. 10 ("[The obligation of good faith] serves as a directive to protect the reasonable expectations of the contracting parties."). *But see* Gillette, *supra* note 52, at 643 (arguing that courts' enforcement of a good faith obligation is likely to lead to uncertainty and inefficient results).

54. "Bad faith" is often used in another context in contract law: egregious or "wanton" forms of straight breach that some courts and commentators have concluded should merit punitive damages. William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 657–62 (1999).

55. See *Market Street Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588 (7th Cir. 1991).

56. *Id.* at 591–92.

57. *Id.*

58. *Id.* at 593–94; *see also* *Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497, 505 (Utah 1980) ("A duty of good faith does not mean that a party vested with a clear right is obligated to exercise that right to its own detriment for the purpose of benefiting another party to the contract.")

59. *Market Street*, 941 F.2d at 594.

60. *Id.* at 594–95.

what they would have included in the deal had they foreseen the particular instance of “sharp dealing” that occasioned litigation.<sup>61</sup>

In *Market Street*, Judge Posner concluded that the evidence was sufficient to warrant trial of whether A had tried to lull and trick B in order to exploit a contractual provision A knew B missed or forgot.<sup>62</sup> A may have had no intention to develop the properties and may have used the financing request as a pretext to reacquire them at a hefty profit. In resolving this question, state of mind was “[t]he essential issue bearing on [A’s] good faith.”<sup>63</sup>

If a contract is conceived as a legal regime governing a particular relationship, enforceable with sanctions, then good faith, used in this fashion, is an anti-evasion device. Actionable breach consists of both explicit violations of the letter of the contract and violations of the spirit or purpose of the deal (as measured by the parties’ initial intentions) undertaken with the intent to circumvent the bargain.<sup>64</sup> Although normative objectives are not my concern at this point, the social purpose in sanctioning such evasive conduct is to facilitate bargaining and efficient commercial exchange by reducing wariness about contracting and countering incentives to expend resources on defensive measures.<sup>65</sup>

Contract law conducts a similar good faith inquiry in dealing with abuse of discretionary terms,<sup>66</sup> while also measuring such breaches against objective commercial standards.<sup>67</sup> Suppose M operates a market, and G is a grower of

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61. *Id.* at 595.

62. *Id.* at 597–98.

63. *Id.* at 597; see also Burton, *supra* note 52, at 385 (arguing that causing the other party to lose the benefits of the agreement is not sufficient for a violation of good faith and that “the purpose of the discretion-exercising party is a key factor”).

64. See *Cone v. Iverson*, 33 P. 31, 34 (Wyo. 1893) (noting that good faith requires “an honest intention to abstain from taking any unconscientious advantage of another, even through the . . . technicalities of law”); see also *Foley v. Interactive Data Corp.*, 765 P.2d 373, 394 (Cal. 1988) (“[T]he covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract . . .”).

65. See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 188 (1922) (“[Men] must be able to assume that those with whom they deal in the general intercourse of society will act in good faith[.]”). Todd Rakoff argues that if the purpose of good faith doctrine is to give the parties what they would have wanted, Judge Posner did not succeed in justifying limitation of the doctrine to cases of intentional trickery. He speculates that Judge Posner may have wanted to limit enforcement of the doctrine in this fashion out of concern that judges might not be good at identifying what parties would have wanted beyond prohibiting trickery. Todd D. Rakoff, *Good Faith in Contract Performance: Market Street Associates Ltd. Partnership v. Frey*, 120 HARV. L. REV. 1187, 1196–98 (2007).

66. Gergen, *supra* note 52, at 998–99; see, e.g., Burton, *supra* note 52, at 394–402. Such deals are efficient if parties would incur excessive costs in trying to predict or calculate ex ante some aspect of their future interactions. See generally Gergen, *supra* note 52, at 1000–37.

67. Another purpose of imposing an obligation to perform in good faith under a contract containing a discretionary term is to render legally sufficient the consideration given by the party retaining discretion. See *Mattei v. Hopper*, 330 P.2d 625, 627 (Cal. 1958).

produce.<sup>68</sup> M likes G's products and wants to offer them at her market. G needs an outlet for his products and likes the popularity of M's market. M and G have an idea of what G is likely to produce and how busy M's market is likely to be. But variables such as weather, demographic patterns, and market prices limit their ability to predict these matters. M agrees to buy all that G produces, according to a schedule of prices, provided that G's products are "of satisfactory quality to M according to the standards of M's market."

The problem such a contract presents is obvious. It may be difficult to determine whether M is in breach. Suppose that new grower NG comes along halfway through the season, offering products equivalent or better in quality to G's but at lower prices. The market has been only moderately busy, and M does not expect to be able to move all of both G's and NG's products. Wishing to get out of her obligation to G, M declares that G's products are no longer satisfactory and stops paying for them.

Has M breached, entitling G to recover damages, or is M in compliance with the terms of a contract under which M and G granted M the power to make this move?<sup>69</sup> M has an obligation to exercise her discretion about the quality of G's products in good faith. If M in fact rejected G's products on quality grounds only to get out of the deal with G because M preferred NG's prices to those she agreed upon with G, M did not act in good faith. She therefore breached her contract with G, even though she has an argument that she complied with the letter of the agreement.<sup>70</sup>

There are two ways to determine whether M's conduct is abusive. One is to ask whether M acted with intent to undermine the bargain through conscious abuse of the discretionary provision ("trickery" in Judge Posner's term). The other is to ask whether a reasonable market manager in the circumstances would have behaved like M.<sup>71</sup> An adjudicator could say M acted in bad faith because

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68. For a case similar to this example, see *Neumiller Farms, Inc. v. Cornett*, 368 So. 2d 272 (Ala. 1979).

69. See *Baker v. Ratzlaff*, 564 P.2d 153, 156-67 (Kan. Ct. App. 1977) (discussing the distinction between termination of a contract and violation of the obligation of good faith performance).

70. G also has an obligation under this deal to deliver a quantity and quality of output in good faith. See generally U.C.C. § 2-306 (2004).

71. The Restatement and the U.C.C. define good faith with a hybrid subjective-objective approach. See *id.* § 1-201(20) (2004) ("'Good faith,' except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing."); RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d ("A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance."); see also 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 400 (3d ed. 2004) ("[C]ourts have often been perplexed as to whether, in particular situations, good faith is to be judged solely by the traditional subjective standard of honesty or also by an objective standard of

M was disingenuous in saying she was unsatisfied with G's goods. Or an adjudicator could say M acted in bad faith if no reasonable manager like M, making a genuine decision about the quality of G's goods, would have said that G's produce was not good enough. Even with the objective inquiry, the point of measuring M's conduct against market norms is to use that standard as a way of determining whether M is faking it about G's goods, and therefore is engaged in undesirable subterfuge.

Another area of contract law that uses good faith to respond to the problem of evasion is the doctrine governing the duty to defend under third-party liability insurance policies.<sup>72</sup> The potential evasion problem is this: The insurer agrees to defend the insured against claims made against the insured. The obligation to defend includes, at least implicitly, the obligation to try or settle cases in the best interests of the insured.<sup>73</sup> As part of the obligation to defend, the insurer must retain the power to decide how to handle claims. Because the insured's liability often exceeds policy limits, the interests of the insurer and the insured can diverge on settlement. If the insurer calculates even a small chance of prevailing at a trial, it might refuse to settle because the policy limit caps its downside from trial loss. The insured, meanwhile, would want the insurer to settle for the policy limit in any case in which the plaintiff were willing, without regard to probability of success at trial, to avoid out-of-pocket loss.

This conflict is exacerbated if the insurer is much larger than the insured. A wealthy insurer is more able to sell adhesion contracts that retain more power for the insurer over the defense of claims.<sup>74</sup> And a large insurer, diversified over a large number of policies, has a greater preference for trial risk than a single small insured. The problem of diverging incentives seems to have no easy solution since the insured's remedy may only be recovery of the same policy limit the insurer was happy to risk in refusing to settle.<sup>75</sup> Insurers have a potentially strong incentive to play games—pretending, as obligated

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reasonableness.”). However, many states have chosen to retain the approach of former versions of the U.C.C. defining good faith solely as “honesty in fact.” Russell A. Hakes et al., *2005 Uniform Commercial Code Survey: Introduction*, 61 *BUS. LAW.* 1541, 1541 & nn.3–4 (2006).

72. 2 ROWLAND H. LONG, *THE LAW OF LIABILITY INSURANCE* § 5A.06 (2008); Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 *HARV. L. REV.* 1136, 1136–38 (1954); Thomas E. Myers, *Recent Developments, Insurance—Limitations on Insurers' Liability for Bad Faith Refusal to Defend and to Consider Settlement Opportunities*, 58 *CORNELL L. REV.* 1255, 1255–56 (1973).

73. Robert H. Jerry, II, *Remedying Insurers' Bad Faith Contract Performance: A Reassessment*, 18 *CONN. L. REV.* 271, 276–77 (1986).

74. Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 *TEX. L. REV.* 1783, 1788–89 (1996).

75. Jerry, *supra* note 73, at 286.

by the contract, to make claims decisions on behalf of insureds, while actually handling claims solely in their own interests.<sup>76</sup>

Courts have said an insurer acts in bad faith if it purports to turn down a settlement because the expected liability from a trial is less than the proposed settlement, while in truth declining the settlement because its own risk from the trial in relation to the settlement is small or nonexistent due to policy limits.<sup>77</sup> (Some courts have extended the insurer's obligation of good faith performance beyond the liability insurance context to include handling claims under first-party insurance contracts.)<sup>78</sup> The law imposes an obligation not to manipulate the insurance contract *ex post* and polices that obligation by looking for evidence of insincerity in the insurer's claims about the reasons for its conduct.<sup>79</sup>

## B. Duty of Collective Bargaining in Good Faith

Labor law supplies another example of the use of good faith doctrine to respond to evasion. Section 8(a)(5) of the National Labor Relations Act declares it an unfair labor practice for an employer "to refuse to bargain

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76. *Id.* at 280. Whether this dilemma requires a legal solution is a point of controversy. Some suggest that the market can correct for the problem because insurers who commonly followed such practices would sell few policies. See Alan O. Sykes, "Bad Faith" Breach of Contract by First-Party Insurers, 25 J. LEGAL STUD. 405, 417–18 (1996); LONG, *supra* note 72, § 5A.06. Others suggest that there might need to be a mechanism to police whether insurers are genuinely performing their obligations under third-party contracts but that contract law has existing means to deal with the problem. Compare Mark Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1263–74 (1994) with *Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E.2d 849, 854 (N.Y. 1972) (stating that the insured is limited to contract remedies against the insurer). A majority of jurisdictions have recognized a right of the insured to recover tort damages that exceed the insurer's exposure under the contract.

77. See *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 404 N.E.2d 759, 762 (Ohio 1980) ("[Bad faith] imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud." (internal quotation marks omitted)). Courts have identified tells that raise the likelihood that an insurer has acted this way: attempts to induce the insured to contribute to the settlement; failure to investigate; failure to advise the insured of the insurer's conflict of interest, the consequences of a refusal to defend, the danger of an excess judgment, or the existence of a settlement offer; failure to respond to settlement offers or initiate settlement talks; rejection of reasonable settlement offers; and failure to appeal a verdict in excess of liability limits when grounds for appeal exist. See Henry G. Miller, *Living With Bad Faith*, 46 INS. COUNS. J. 34, 35 (1979); Myers, *supra* note 72, at 1264–65; Douglas R. Richmond, *Advice of Counsel and Insurance Bad Faith*, 73 MISS. L.J. 95, 97–98 (2003).

78. See *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973); *Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334 (Haw. 1996); Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 108–15 (1994).

79. Advice of counsel—to which I return in Part III, *infra*—plays an important role. If the insurer asked a lawyer objectively to assess trial prospects and genuinely used the lawyer's advice as a basis to make its settlement decision, it made what looks like a decision on the merits (unless it manipulated the lawyer to get the opinion it wanted or knew the lawyer was supplying bogus advice). See James M. Fischer, *Should Advice of Counsel Constitute a Defense for Insurer Bad Faith?*, 72 TEX. L. REV. 1447, 1461–67, 1480 (1994); Richmond, *supra* note 77, at 96–97; Richmond, *supra* note 78, at 120–21.

collectively with the representatives of his employees.”<sup>80</sup> Collective bargaining is defined in part as “the mutual obligation of the employer and the representative of the employees to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>81</sup> Good faith has been defined as negotiating “with an open and fair mind and sincerely endeavor[ing] to overcome obstacles or difficulties.”<sup>82</sup>

While the law might seek to facilitate contracting in general, it is usually indifferent to whether parties in particular markets succeed in making deals. Since the public interest in labor negotiation is seen as strong, however, and the perception is that employers enjoy superior informational and bargaining power and that both employers and employees have limited ability to contract with alternative parties, the law intervenes to give negotiation a boost.<sup>83</sup>

Imposing a duty to negotiate raises a problem of evasion. If the employer’s obligation were simply to negotiate, the employer might fulfill that requirement by only showing up and going through the motions, with no intent to compromise or reach any sort of agreement.<sup>84</sup> A regime in which employers could pretend to bargain would not, in any meaningful sense, advance the objective of deal consummation. Recognizing this problem, the law qualifies the duty to negotiate by making it a duty to negotiate in good faith.<sup>85</sup>

A good faith effort to negotiate is one that is not undertaken disingenuously and merely for the purpose of satisfying the formal negotiation requirement, without true intent to make a deal.<sup>86</sup> “Surface bargaining” or “shadow boxing,” defined as conducting negotiations “as a kind of charade or sham, all the while

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80. 29 U.S.C. § 158(a)(5) (2006).

81. *Id.* § 158(d). Early in its history, this edict was explained as requiring “more than the holding of conferences and the exchange of pleasantries.” *Conn. Coke Co.*, 2 N.L.R.B. 88, 89 (1934). It required that both parties “approach the negotiations with an open mind and . . . make a reasonable effort to reach a common ground of agreement.” *Id.* In addition, it required that one “match . . . proposals, if unacceptable, with counterproposals.” *N.L.R.B. v. Am. Nat’l Ins.*, 343 U.S. 395, 402 (1952) (citing *Houde Eng’g Corp.*, 1 N.L.R.B. 35 (1934)).

82. *N.L.R.B. v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir. 1941).

83. See Richard C. Cooper, *Boulwarism and the Duty to Bargain in Good Faith*, 20 RUTGERS L. REV. 653, 656 (1966); Keith N. Hylton, *An Economic Theory of the Duty to Bargain*, 83 GEO. L.J. 19, 51–52 (1994); Harry H. Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467, 468 (1964); Aditi Bagchi, Note, *Unions and the Duty of Good Faith in Employment Contracts*, 112 YALE L.J. 1881, 1882–85 (2003).

84. See Wellington, *supra* note 83, at 475–76.

85. Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1413 (1958).

86. See Hylton, *supra* note 83, at 49; Note, *Boulwarism and Good Faith Collective Bargaining*, 63 MICH. L. REV. 1473, 1476 (1965).

intending to avoid reaching an agreement,” are prohibited.<sup>87</sup> Courts have said that in resolving a charge of surface bargaining, “the central issue is motive.”<sup>88</sup>

The problem is that negotiation is hard to police.<sup>89</sup> How does the law require a person to try to reach agreement without requiring her to reach a particular agreement or any agreement at all?<sup>90</sup> The objective of labor law is to require collective *bargaining*, not collective agreeing. Both parties must retain the power to walk away.<sup>91</sup> The project of regulating negotiation would seem to founder between a formal and easily evaded obligation to negotiate and a substantive and undesirable obligation to accept particular terms.<sup>92</sup>

Labor law has tried to solve this problem by identifying clues said to demonstrate that an employer is not really negotiating: simply listening to and rejecting a union’s proposals; failing to make counterproposals when stating that the union’s demands are unsatisfactory; engaging in stalling tactics; suddenly shifting position when agreement is near; rejecting provisions routinely included in like agreements; withholding agreement on trivial matters; sending in negotiators who lack authority to agree; taking unilateral action on matters on the table in negotiations; and withholding critical information, such as financial data.<sup>93</sup> This approach is obviously underinclusive,<sup>94</sup> and the more the law articulates specific examples of behavior that reveal bad faith, the better roadmap it gives employers for how to avoid revealing a true intention not to

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87. *Cont’l Ins. Co. v. N.L.R.B.*, 495 F.2d 44, 48 (2d Cir. 1974).

88. *Truck Drivers & Helpers Union, Local No. 170 v. N.L.R.B.*, 993 F.2d 990, 996 (1st Cir. 1993).

89. *Cox*, *supra* note 85, at 1414–15.

90. See *Bagchi*, *supra* note 83, at 1897; *Cooper*, *supra* note 83, at 657; *Wellington*, *supra* note 83, at 473.

91. *N.L.R.B. v. Am. Nat’l. Ins. Co.*, 343 U.S. 395, 402 (1952); *Cooper*, *supra* note 83, at 654.

92. See *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960) (stating that the employer is not required “to contract in a way the Board might deem proper,” but the employer may not use this right “as a cloak” and that “bad faith is prohibited though done with sophistication and finesse”); R.W. Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988, 989 (1961) (explaining how Congress sought to advance both concerns when enacting the legislation but failed to specify how to reconcile them).

93. *Cox*, *supra* note 85, at 1418–28; Fleming, *supra* note 92, at 991–92; see also Note, *Employer “Good Faith Doubt”*, 116 U. PA. L. REV. 709, 717–18 (1968) (explaining that refusal to recognize union representatives without a good faith doubt as to the existence of a union majority is a violation of the duty to bargain collectively).

94. See *Hylton*, *supra* note 83, at 24 & n.16. The good faith inquiry is also potentially overinclusive. If good faith negotiation is defined to mean engaging in give-and-take, the test could wrongly identify as a violation a case in which the employer made genuine and honest calculations about its best offer and came to the table to present that offer without any room to modify it. This was the problem with “Boulwareism,” a practice of General Electric in the post-war period. See *Cooper*, *supra* note 83, at 659–66; Note, *supra* note 86, at 1474–81. Deeming this kind of employer posturing to lack good faith perversely leads to a regime that, in effect, requires employers to come to the table with positions that they plan to abandon all along. See *N.L.R.B. v. Gen. Elec. Co.*, 418 F.2d 736 (2d Cir. 1969); *Gen. Elec. Co.*, 150 N.L.R.B. 192 (1964).

make a deal.<sup>95</sup> The temptation for regulators is to respond by going further—to the inevitable point of dictating terms of agreements.<sup>96</sup>

Labor law's experiment with bad faith may establish that negotiation is an activity that requires too much discretion for individual actors to allow for effective policing beyond perhaps preventing lies and fraud.<sup>97</sup> Collective bargaining law nevertheless remains an example of how the concept of good faith supplements a primary rule of conduct when the law confronts actors who duck the substance of obligations while complying with the primary rule only in form.

### III. EVASION IN CRIMINAL AND CORPORATE LAW

Evasion is more urgent and intriguing, in my view, in two regulatory areas characterized by sophisticated, resourceful actors who are accustomed to making behavioral decisions in the shadow of the law. The first is white-collar crime, particularly the law of fraud, in which legal prohibitions must be sufficiently flexible to deal with evolving forms of commercial behavior, yet adequately firm and definite to ensure that punishment is limited to deserving actors and that enforcement does not overdeter. The second is the law of corporate governance, in which rules must be potent enough to shape management behavior and general enough to apply to diverse forms of abuse, yet provide a sufficient cushion against liability to encourage risk-taking and independence in management of firms.

Both of these areas of law have experimented with good faith and bad faith as doctrinal tools to mediate between competing demands for flexibility and definiteness in law. In this Part, I demonstrate how criminal and corporate law have deployed good faith and bad faith to contend with evasion and to fortify primary rules of liability. The results have not been entirely satisfying. My further objectives therefore are to clarify the law of good faith and bad faith in criminal and corporate law and to suggest improvements in those doctrines.

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95. Cooper, *supra* note 83, at 694.

96. Cox, *supra* note 85, at 1430.

97. Archibald Cox perhaps unwittingly made this apparent in his seminal article on this subject: "Although the law cannot open a man's mind, it can at least compel him to conduct himself *as if* he were trying to persuade and were willing to be persuaded." *Id.* at 1411 (emphasis added). See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1794–95 (1983) (arguing that requiring the employer to bargain, while allowing the employer to retain full freedom to reject terms, fails to accomplish the goal of facilitating labor agreements).

### A. Defining White-Collar Wrongs

I make four principal points about good faith and bad faith in the law governing white-collar criminal offenses. First, criminal prohibitions governing economic conduct (fraud laws are the paradigm) must be sufficiently broad to deal with evasion in the form of behavioral redesign. Second, the long-standing good faith defense in criminal law is a means of reducing potential overbreadth in the definition of such offenses. Good faith and bad faith doctrines can help with evasion in two ways: by broadening a primary liability rule to prevent circumvention of the rule (like the examples discussed in Part II); or (as in criminal law) by limiting sanctions to evasive actors through a defense to a primary liability rule that has been made overbroad in order to thwart circumvention.

Third, the defense of reliance on professional advice is a variant on the good faith defense that illustrates particularly well how the mental state of good faith connects to evasion. Fourth, achieving greater clarity about the good faith defense could lead to profitable use of the defense in other areas of white-collar crime that involve actors who might too easily avoid liability through behavioral redesign.

#### 1. Fraud Prohibitions as Anti-Evasion Rules

The mens rea required for a fraud conviction is the “specific intent to defraud.”<sup>98</sup> Neither of the two simplest explanations of this concept turns out to work. In modern criminal law, the mental states of purpose and intent are ordinarily equivalent.<sup>99</sup> The dominant conception of purpose, as embodied in the Model Penal Code, is having the “conscious object” of engaging in whatever action the law in question requires be done purposefully to warrant sanction.<sup>100</sup> If having the “specific intent to defraud” means having the conscious object to commit fraud, the mental-state requirement for fraud begs the question. One still needs to know what counts as fraud. If having the “specific intent to defraud” means having the conscious object to engage in whatever action or series of actions is alleged to work a fraud, the mental-state requirement does no sorting work. All defendants who act voluntarily and

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98. See, e.g., *United States v. Gole*, 158 F.3d 166, 167 (2d Cir. 1998); *United States v. Foshee*, 578 F.2d 629, 634 (5th Cir. 1978).

99. MODEL PENAL CODE § 2.02 cmt. 2 (1985).

100. *Id.* § 2.02(2)(a).

consciously will be guilty, provided that other, non-mental-state requirements for fraud are satisfied.<sup>101</sup>

“Specific intent to defraud” means something more nuanced. Fraud is a means of depriving people of property and similar interests other than through force or theft.<sup>102</sup> Fraud can be conceived as a form of evasion of law. If there were no prohibition on theft, there would be far less incentive to devote energy to fraudulent schemes. Frauds require extra physical and mental exertion and often investment of resources. The purpose of expending that effort is to increase the chances of obtaining others’ property without suffering legal (as well as non-legal) sanctions, as would be more likely to follow in an instance of outright theft.

Fraud requires deception. The idea is to cause the victim to relinquish her property or similar interest voluntarily. The wrongfulness of fraud lies in the use of deception to procure the victim’s purportedly voluntary action. The difficulty in defining fraud is that the category of deception is much broader than the category of fraud or any category one would want the law of fraud to occupy. Quotidian economic exchange is rife with deception. Fraud law must draw a line between wrongful deception and acceptable behavior in the rough-and-tumble of markets.

Conduct is not a good way for the law to accomplish this sorting. The trouble with defining fraud according to specified actions (for example, in the sale of a used car, tampering with the odometer is fraud, but painting over rust is not) is that the law would remain one step behind the fraud artist, an actor who seeks out novel means of circumventing legal prohibitions. The law thus turns to state of mind to accomplish the sorting. Fraud is defined, in essence, as all means of deception causing or threatening loss to a victim that are pursued with the “specific intent to defraud.”<sup>103</sup> This mental state has often been interpreted in the courts—at least in cases of non-obvious fraud—to

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101. See, e.g., *United States v. Walker*, 191 F.3d 326, 334 (2d Cir. 1999) (stating that the elements of mail fraud are “(1) a scheme to defraud victims of (2) money or property, through the (3) use of the mails”); *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000) (defining “scheme to defraud” as “a plan to deprive a person ‘of something of value by trick, deceit, chicane or overreaching’” and as “characterized by a departure from community standards of ‘fair play and candid dealings’” (quoting *McNally v. United States*, 483 U.S. 350, 358 (1987) and *United States v. Ragosta*, 970 F.2d 1085, 1090 (2d Cir. 1992))).

102. See Buell, *supra* note 11, at 1972–83 (developing this argument in more detail).

103. See, e.g., *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (explaining that intent to defraud means an intent to obtain property from someone by deceiving or cheating them); *United States v. Giles*, 246 F.3d 966, 973 (7th Cir. 2001) (“To obtain a conviction for mail fraud, the government must show that the defendant acted with intent to defraud. He must act with the specific intent to deceive or cheat the victim, either for financial gain or to cause financial loss. The scheme must be reasonably calculated to deceive persons of ordinary prudence.”).

mean intent to deceive *coupled with* awareness of the wrongfulness of one's conduct.<sup>104</sup> Awareness that one is stepping over the normative line in the market in which one acts distinguishes acceptable (and therefore expected) deception from wrongful deception.

## 2. Defense of Good Faith

The federal courts have repeated innumerable times the black-letter principle that a defendant's good faith negates the specific intent to defraud.<sup>105</sup> With proper record evidence, a defendant in a criminal fraud trial is entitled to a jury instruction on good faith, or at least an instruction defining fraudulent intent that sufficiently encompasses the idea that to act in good faith is to act without such intent.<sup>106</sup> This is not an affirmative defense. A good faith claim is a factual assertion that, if believed (or, more accurately, if raising a reasonable doubt), makes it impossible to conclude that the defendant had the specific intent to defraud.<sup>107</sup>

Courts have not clearly explained good faith in fraud law. Sometimes the idea is described as a defendant's belief that her representations to a victim were true.<sup>108</sup> But this cannot be right. A fraud can consist of a series of literally true representations that nonetheless deceive—in sum, in the way they are presented, or in what they omit.<sup>109</sup> Fraud is not perjury minus the oath.

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104. Buell, *supra* note 11, at 1996–2005.

105. See *Durland v. United States*, 161 U.S. 306, 314–15 (1896); *United States v. Goss*, 650 F.2d 1336, 1344 (5th Cir. 1981); *United States v. Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984); see also 2 KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* § 8:17, at 51–52 (2d ed. 1991).

106. See, e.g., *United States v. Leahy*, 445 F.3d 634, 651–52 (3d Cir. 2006) (discussing the circuit split over whether separate good faith instruction is mandatory and holding to the majority position that it is not); *United States v. Dockray*, 943 F.2d 152, 154–55 (1st Cir. 1991) (same); *United States v. Casperson*, 773 F.2d 216, 222–23 (8th Cir. 1985) (holding that good faith instruction is mandatory with record evidence); *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc) (same).

107. See, e.g., *Willis v. United States*, 87 F.3d 1004, 1008 (8th Cir. 1996); 2 BRICKEY, *supra* note 105, § 8:17, at 52. Decisions addressing fraud liability under the Securities Exchange Act of 1934 also have stated that an actor's good faith is incompatible with the presence of scienter. E.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976); *Backman v. Polaroid Corp.*, 893 F.2d 1405, 1418 (1st Cir. 1990) (depublished); *Hoffman v. Estabrook & Co.*, 587 F.2d 509, 513 n.7 (1st Cir. 1978); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116–17 (9th Cir. 1989).

108. *United States v. Alkins*, 925 F.2d 541, 550 (2d Cir. 1991); see also *Williams*, 728 F.2d at 1405.

109. This is why, for example, the prohibition on fraud under the Securities Exchange Act of 1934 covers more than false representations. 15 U.S.C. § 78j (2006) (prohibiting “any manipulative or deceptive device”); 17 C.F.R. § 240.10b-5 (2009) (making it a violation to “employ any device, scheme, or artifice to defraud . . . [or] engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security”).

Other courts have defined good faith as the absence of intent to defraud.<sup>110</sup> But why the prevalent use of the special term “good faith” in the fraud context if all it means is lack of the statutorily required mental state? We do not talk about a good faith defense to the crime of intentional homicide. This definition of good faith only begs the question in the same way as the statement that the mental state for fraud is “the specific intent to defraud.”

Some courts have defined good faith as “a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.”<sup>111</sup> The idea of an “honest” belief or opinion gets at something. A “dishonest belief” is nonsensical. One cannot believe something that one knows not to be true (or even, of course, believes not to be true). But one can disingenuously purport to have, or act as if one has, a particular state of mind.<sup>112</sup> One can manipulate state of mind in order to achieve a desired end, such as by adopting or professing a secondary, pretextual purpose for one’s conduct that the law might say makes conduct permissible.

To act with good faith is to act without design to evade one’s obligations. Consider the case of a man charged with fraud for tinkering with a government contracting process by doctoring envelopes to make an impermissibly late bid appear to have been postmarked before bidding closed.<sup>113</sup> A court said he should have been permitted to argue good faith based on the contention that he switched prepaid certified-mail envelopes because he mistakenly used one with an earlier serial number for a mailing that did not need such an envelope, and he did not want to waste the envelope.<sup>114</sup> Or consider a petroleum dealer who sold a product as crude oil that was mainly residuum from crude oil processing.<sup>115</sup> A court said he was entitled to have the jury instructed on his assertion of good faith because he introduced evidence that the residuum met

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110. *United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982).

111. *United States v. Behr*, 33 F.3d 1033, 1036 n.7 (8th Cir. 1994); *United States v. Tarallo*, 380 F.3d 1174, 1191 (9th Cir. 2004); *United States v. Sayakhom*, 186 F.3d 928, 940 (9th Cir. 1999); see also *United States v. Nacchio*, 519 F.3d 1140, 1165 (10th Cir. 2008) (approving jury instruction similarly defining good faith in the context of securities fraud); *United States v. Smith*, 13 F.3d 1421, 1426 (10th Cir. 1994) (explaining that the defendant has a defense if she “in good faith actually believed (1) that the plan, howsoever visionary and impractical, would succeed, (2) that promises made would be kept and (3) that representations made would be fulfilled”).

112. For an interesting discussion of fraud and religious belief, see the opinions in *United States v. Ballard*, 322 U.S. 78 (1944). The majority thought that a trial court properly kept the jury from considering the truth of the religious beliefs of the defendants, who were charged with fraud for procuring supporters for a movement called “I Am.” *Id.* at 85–88. In dissent, Justice Jackson argued that the indictment should be dismissed because “any inquiry into intellectual honesty in religion raises profound psychological problems.” *Id.* at 93 (Jackson, J., dissenting).

113. *United States v. Fowler*, 735 F.2d 823 (5th Cir. 1984).

114. *Id.* at 828–29.

115. *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981).

the regulatory definition of crude oil as understood within the industry.<sup>116</sup> If juries credited these claims, neither actor pursued a stratagem designed to appropriate property without entitlement and to insulate him from sanction by disguising his conduct as ordinary and legitimate.<sup>117</sup>

Good faith doctrine in the law of criminal fraud is meant to identify the actor not bent on circumvention of a relevant regime.<sup>118</sup> But it operates defensively. Rather than broadening a primary rule to include evasive actors who arguably comply with the letter of the rule but contravene its underlying purposes, the idea is to ensure that a primary rule (“do not defraud”), that is itself a broad anti-evasion device, sanctions only those who harbor genuine purpose to violate the normative obligations that the rule is in the business of enforcing.

### 3. Reliance on Professional Advice

The case of the actor who relies on professional advice demonstrates particularly well how good faith doctrine embodies the anti-evasion idea. A person who justifies her conduct on this ground might have a legitimate claim that she is not subverting her legal obligations. This defense depends, as it should, on how she uses the advisor. Hugely consequential matters of civil and criminal liability can pivot on this question, as illustrated by recent investigations of the merger of two of the nation’s largest banking institutions.<sup>119</sup>

Advice of counsel is a recurring scenario in the law of fraud.<sup>120</sup> Consider an individual doing business in a complex environment who faces a web of rules. The individual is also subject to an overriding standard, such as an edict not to abuse a fiduciary relationship or not to mislead. The individual is interested in pursuing a course of conduct without incurring sanction. She engages a lawyer. The lawyer advises that her planned conduct does not violate the web of rules, and she goes forward with it. Her conduct nonetheless implicates an overriding

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116. *Id.* at 1344–45.

117. See 2 BRICKEY, *supra* note 105, § 8:17, at 51 (“Good faith is incompatible with awareness of wrongdoing.”); see also *United States v. Bailey*, 327 F.3d 1131, 1143 (10th Cir. 2003) (holding that the actor’s belief that his victims will recoup their losses in the end does not establish good faith); *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (same); *United States v. Shareef*, 714 F.2d 232, 234 (2d Cir. 1983) (same); *United States v. Lamont*, 565 F.2d 212, 227 (2d Cir. 1977) (holding that it is not good faith to continue to utter previously innocent misrepresentations after learning that they are false).

118. Such a concept animates a rule providing that an actor cannot be guilty of larceny if she takes property in the “genuine” belief that it is hers—meaning she really thought it was hers and is not just saying so to exploit an exception to criminal liability. N.Y. PENAL LAW § 155.15(1) (West 2010); *People v. Green*, 841 N.E.2d 289, 291–92 (N.Y. 2005).

119. See David Enrich et al., *BofA to Release Details of Merrill Advice*, WALL ST. J., Oct. 13, 2009, at C1.

120. See 2 BRICKEY, *supra* note 105, § 8:17, at 53–54.

standard, such as the prohibition on fraud. When she is sued or prosecuted, she asserts that she did not have the requisite fault (the intent to defraud) because she relied on the advice of an attorney that her conduct was permissible.<sup>121</sup>

Courts have held that reliance on counsel in such contexts can negate the state of mind required for liability only if the actor relied on the lawyer in good faith.<sup>122</sup> Good faith reliance means more than consulting an attorney.<sup>123</sup> It requires selection of a competent lawyer before acting, disclosure of relevant facts to the lawyer, receipt of a legal opinion based on those facts, belief that the opinion was given in good faith, and reasonable reliance on that opinion.<sup>124</sup>

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121. Common iterations of the problem include the commission of accounting fraud, *see, e.g.*, *United States v. Ebbers*, 458 F.3d 110, 125–26 (2d Cir. 2006), *United States v. Simon*, 425 F.2d 796, 805–06 (2d Cir. 1969), JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 593–605 (3d ed. 2007), and the use of novel tax shelter structures to commit arguable tax evasion or tax fraud, *see Background and Present Law Relating to Tax Shelters: Hearing Before the S. Comm. on Finance*, 107th Cong. (2002). *See also* Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879 (2007); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999).

122. *See e.g.*, *United States v. Hansen*, 772 F.2d 940, 947 (D.C. Cir. 1985); 3 BRICKEY, *supra* note 105, § 11:03, at 24 (discussing good faith reliance in the context of corporate criminal liability). *See generally* Note, *Reliance on Advice of Counsel*, 70 YALE L.J. 978 (1961).

123. *United States v. Schaefer*, 299 F.2d 625, 630–31 (7th Cir. 1962).

124. *United States v. Danser*, 26 F.R.D. 580, 587 (D. Mass. 1959); *see United States v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008); *United States v. Dardi*, 330 F.2d 316, 331 (2d Cir. 1964); *United States v. Winans*, 612 F. Supp. 827, 48 (S.D.N.Y. 1985); 2 BRICKEY, *supra* note 105, § 8:51, at 133–34; 3 BRICKEY, *supra* note 105, § 11:02, at 9–10; *see also United States v. DeFries*, 129 F.3d 1293, 1308–09 (D.C. Cir. 1997) (holding that the good faith defense does not require disclosure of every fact to a lawyer but only those “primary facts which a lawyer would think pertinent”); *United States v. Piepgrass*, 425 F.2d 194, 197–98 (9th Cir. 1970) (rejecting the good faith defense where the attorney was a financial participant in client activities and had a personal interest in their success). In the tax-shelter context, a lawyer providing a “marketed” opinion also must make inquiry as to relevant facts and follow up if she has reason to believe any facts are untrue; the lawyer must also opine as to whether it is more likely than not that the client will prevail on each material issue. 31 C.F.R. § 10.35 (2009). These requirements are enforced not through application of a good faith defense in litigation against the client but as professional disciplinary rules that govern the practice of attorneys before the Internal Revenue Service. *See id.* § 10.50. As to the taxpayer’s potential criminal liability, some decisions suggest that mere consultation with a lawyer, without regard to the nature of the disclosure to the lawyer, might be sufficient to establish good faith. *See United States v. Bursten*, 395 F.2d 976, 981–82 (5th Cir. 1968). I am skeptical whether this could hold up now if tested. It seems close to saying that there can be no criminal liability for tax evasion because tax law is too unclear to form the intent to evade it. *Cf. United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (holding that there can be no intent to evade as a matter of law if different branches of the federal government on the record have “plausibly reach[ed] directly opposing conclusions” on the underlying question of taxability); *United States v. Garber*, 607 F.2d 92, 98 (5th Cir. 1979) (stating that the “unresolved nature” of the underlying question of tax law is relevant but not dispositive on the defendant’s intent to evade tax). Other courts have said that *Garber* is incorrect for not further requiring a showing that the uncertain nature of the law has been known to the defendant. *See, e.g.*, *United States v. Curtis*, 782 F.2d 593, 598–99 (6th Cir. 1986); *United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 96–97 (2d Cir. 1983)).

The act of engaging a lawyer can be ambiguous. A person who seeks out a lawyer might be a person eager to avoid subversion of a legal regime. Indeed, if lawyers are effective gatekeepers, legal regimes should encourage and reward those who solicit legal advice before embarking on a contemplated course of conduct—especially in highly regulated environments.<sup>125</sup>

A person who seeks out a lawyer might instead be particularly bent on subverting the law. Especially if the background legal regime privileges those who assert reliance on counsel, the lawyer's value to that person might be helping that person perfect a course of conduct aimed at working the very harm with which the legal regime is concerned, in a way least likely to lead to sanction.<sup>126</sup> For example, an auditor (who functions much like a lawyer for purposes of the public-company accounting regime<sup>127</sup>) might advise a corporate manager that she need not write down the value of a faltering asset if she has a present intention to infuse future capital into that asset. In response to the advice, the manager may "form" that intent, where it otherwise did not exist, in order to avoid reporting the loss.<sup>128</sup>

Good faith doctrine tries to distinguish actors who seek a professional's help to identify vulnerabilities in a legal regime from those who seek such help in order to ensure compliance with the regime. As I discuss in Part IV, this is no easy task. Among actors who design behavior in the shadow of a complex regulatory regime, it can be difficult to know the difference between an actor who meticulously complies with the regime and an actor who sets about dismantling it.

In the context of professional advice, good faith doctrine errs on the side of underinclusion. There may be many actors who consult lawyers in an

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125. See *DeFries*, 129 F.3d at 1309 ("It is an important part of a lawyer's job to warn his client about behavior that, while not illegal, nonetheless has the potential to embroil a client in controversy.").

126. William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1562–66 (2008); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1455–64 (2006).

127. See *United States v. Rigas*, 490 F.3d 208, 220 (2d Cir. 2007); *United States v. Ebberts*, 458 F.3d 110, 125–26 (2d Cir. 2006); *United States v. Simon*, 425 F.2d 796, 805–06 (2d Cir. 1969).

128. See, e.g., Complaint for Violations of the Federal Securities Law at 2–3, *SEC v. Meridian Holdings, Inc.*, No. CV07-06335-DDP (C.D. Cal. Sept. 28, 2007), available at <http://www.sec.gov/litigation/complaints/2007/comp20318.pdf> (charging a firm with securities fraud for doubling its stock price by reporting a large default judgment and interest on the judgment as assets and income, though managers had no basis to believe the judgment was collectible); Superseding Indictment at 24–25, *United States v. Causey*, Cr. No. H-04-25 (S-2) (S.D. Tex. July 7, 2004), available at <http://news.findlaw.com/hdocs/docs/enron/usvlay70704ind.pdf> (charging former Enron Chairman and CEO Kenneth Lay with criminal fraud for, in part, avoiding a large write-down to the value of a major business by falsely asserting to auditors an intention to invest in the business in the future, when, in fact, the business was failing and being abandoned).

above-board manner and nonetheless are engaged in conduct that flatly contradicts the purpose of the relevant legal regime. This possibility is particularly worrisome given the market for professional services, which may produce a race to the bottom in the sale of legal opinions.<sup>129</sup> The law is willing to forego those cases to avoid risk of sanctioning actors genuinely trying to comply with the law. Actors found to be proceeding without good faith will be those who provably manipulate their interactions with professional advisors to obtain an opinion that will supply them with a defense and to prevent the advisor from acting as a gatekeeper.

Why would the law privilege those who pay skilled technicians to help them? And what about the idea that mistake of law should rarely be a defense?<sup>130</sup> The reliance defense is a compromise. Complexity in modern regulatory environments is unavoidable. If sanctions are to fall only on those who deserve them, provision must be made for those who try to get things right but nonetheless get them wrong. Furthermore, increased compliance will result from encouraging people to talk to experts before acting.

Costs include potential loss of control for a regulatory regime, which may end up delegating questions of legality to private actors not tethered to the public interest. One way to control these costs is to raise the hurdle for satisfying the advice-of-counsel defense, such as by saying that procuring legal advice on parts of a matter will not insulate the whole.<sup>131</sup> Another is to ensure that lawyers are regulated effectively, so they maintain fealty to the law and to their roles as its servants rather than acting—to use David Luban’s description of the “torture memo” authors—as “absolvers” of others.<sup>132</sup>

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129. See David Luban, *Selling Indulgences*, SLATE, Feb. 14, 2005, <http://www.slate.com/id/2113447>; see also Marvin A. Chirelstein & Lawrence A. Zelenak, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1939 (2005) (stating that marketing of tax shelters by investment and accounting firms “has developed into a perfect plague”).

130. See MODEL PENAL CODE, § 2.04 (1985); see also *United States v. Cross*, 113 F. Supp. 2d 1253, 1263 (S.D. Ind. 2000) (stating that reliance on advice of counsel is not a defense to “general intent” crimes, such as illegal gambling offenses). Notwithstanding the defense of good faith, mistake of law is not a defense to a fraud charge. *United States v. Stockheimer*, 157 F.3d 1082, 1088–89 (7th Cir. 1998); *United States v. Hollis*, 971 F.2d 1441, 1451–52 (10th Cir. 1992).

131. See, e.g., *United States v. Christopher*, 142 F.3d 46, 48–50 (1st Cir. 1998) (describing a case in which the defendant, in prosecution for fraudulent representations about the value of collateral made to procure approval of state insurance regulators for purchase of insurance companies, unsuccessfully proffered the advice-of-counsel defense based on a claim that transactional lawyers who worked on acquisition were aware of liens on the collateral with which the defendant allegedly defrauded regulators).

132. See Luban, *supra* note 129.

#### 4. Potential Extensions

Violent crimes, and other direct intrusions on liberty, tend to be relatively easy to identify. The relevant acts are familiar and observable, and they do not change much over time. This is not so for white-collar crimes.<sup>133</sup> The acts are harder to describe and identify because they are usually variations on otherwise socially acceptable or desirable activity.<sup>134</sup> White-collar wrongs have shape-shifting tendencies. The relevant behaviors are non-specific (fraud, obstruction of legal process, corrupt governance, and so on) and evolve over time, often in response to development of the law.

The nature of white-collar crimes yields broad prohibitions that cover lots of conduct and tend toward vagueness in their non-specific act descriptions. The central difficulty for the law is to distinguish criminal from non-criminal behavior given that the act alone is often innocuous and the mental state must do most of the line-drawing work.

The concept of good faith can help with this problem, even beyond the law of fraud. Consider the example of obstruction of justice. Some statutes prohibiting obstruction of federal court and agency proceedings include a catch-all provision (known as the omnibus clause) that covers anyone who “corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice.”<sup>135</sup>

Judges have described this statutory language as “drafted with an eye to ‘the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined,’”<sup>136</sup> and as “intended to ensure that criminals could not circumvent the law’s purpose by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of [the statute’s] specific prohibitions.”<sup>137</sup> Recently enacted obstruction prohibitions cover acts in anticipation of legal proceedings not yet commenced<sup>138</sup>

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133. See STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME 30–47 (2006) (comparing differences in determining mens rea, harmfulness, and moral culpability of street crime versus white-collar crime).

134. It is rarely socially welcome, and never routine, to cause the death of another person, but it is common and usually unobjectionable to cause a person to part with property.

135. 18 U.S.C. § 1503 (2006); *id.* § 1505. For further discussion of obstruction of legal process, see Buell, *supra* note 10, at 1541–45.

136. *United States v. Griffin*, 589 F.2d 200, 206–07 (5th Cir. 1979) (quoting *Anderson v. United States*, 215 F.2d 84, 88 (6th Cir. 1954)).

137. *United States v. Tackett*, 113 F.3d 603, 607 (6th Cir. 1997).

138. 18 U.S.C. § 1512.

and destruction of evidence relevant to any federal inquiry, not just court proceedings.<sup>139</sup>

The breadth of conduct definitions in obstruction laws is worrisome.<sup>140</sup> Inquiry into state of mind is used in an effort to limit the statutes' reach. But the mental state for obstruction of justice has the same problem as that for fraud. While there is confusion on the subject, most courts have defined the mental state for obstruction as a purpose to obstruct justice that is "improper."<sup>141</sup> The use of the term "improper" begs the question and does not suffice to separate offensive from welcome behavior. A person's desire to avoid sanction is not enough to justify punishment. After all, litigating is a way to avoid sanction and is not only welcome but most of the time is a matter of right.

The law governing obstruction of justice needs instruments for drawing lines between appropriate contestation of legal process and improper manipulation or perversion of that process. Lying and tampering with evidence are easy, core cases that do not require careful thought about line-drawing. As it becomes routine for such behavior to be punished, harder cases arise at the margins. The law requires a mechanism for distinguishing, for example, between routine document destruction in the ordinary course of business and the disposal of evidence to thwart imminent regulatory proceedings.<sup>142</sup>

One approach would be to say that all forms of intentional obstruction of legal process are potentially punishable, but those pursued in good faith are not.<sup>143</sup> The good faith actor is one who does not endeavor to manipulate the legal process in ways that she knows exceed recognized limits of fair play. If the culpable mental state for obstruction of justice is "an improper purpose to obstruct justice," and there is a defense of good faith, then an actor is punishable only if she distorts legal process knowing and intending that her conduct exceed the bounds of legitimate adversary behavior.

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139. *Id.* § 1519.

140. See Buell, *supra* note 10, at 1541–45; Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1517–33 (2009); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1446–91 (2009); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 688–89 & n.185 (2006).

141. See *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (holding that this mens rea formulation saves the statutes from the charge that they are unconstitutionally vague); see also *Bosselman v. United States*, 239 F. 82, 86 (2d Cir. 1917) (holding that any endeavor to obstruct justice is "corrupt").

142. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698–701, 704–06 (2005) (stating that a concept of "consciousness of wrongdoing" should be used in jury instructions in order to distinguish between these cases).

143. Courts occasionally have used formulations such as "good faith belief" when discussing a defendant's mental state in relation to obstruction of justice charges. See, e.g., *United States v. Frankhauser*, 80 F.3d 641, 649 (1st Cir. 1996).

For example, consider witnesses' assertion of the Fifth Amendment right against self-incrimination in the grand jury, which of course interferes with the discovery of facts. An actor who intentionally causes others to assert that right might or might not be acting in good faith. A lawyer who loyally advises a client to assert the right for self-protection, of course, would be acting in good faith, as would a relative or friend altruistically giving the same advice. But if the target of a grand jury investigation were to run around telling potential witnesses against her to protect a criminal venture by clamming up in the grand jury on Fifth Amendment grounds, she would not be acting in good faith. She would be intentionally exploiting a formal rule to prevent a sanctioning process from reaching her, knowing that the particular rule is designed for another purpose.<sup>144</sup>

A defense of good faith may have promise in other areas of white-collar crime that involve wrongs against public obligations that tend to be defined in general terms (health care fraud and environmental crimes come to mind, for example).<sup>145</sup> Of course, another approach is for the law to abandon criminalization of these sorts of behaviors.<sup>146</sup> But as long as some such conduct continues to be criminal—and, in truth, even if it is regulated solely with monetary sanctions—commercial and technological innovation will produce pressure to define prohibitions broadly. Broad liability definitions in turn create demand for doctrinal concepts like good faith that hone in on the aspects of actors' practical reasoning that separate those for whom sanctions are well justified from those for whom they are not.

## B. Defining Corporate Fiduciary Duty

Shareholder lawsuits against directors for breach of fiduciary duty under state law are a means of regulating the management of firms.<sup>147</sup> The dominant question for Delaware corporate law is how to strike an optimal balance between

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144. Another example of an obstructive actor lacking good faith might be a class action plaintiffs' counsel who, to secure lead position in a lawsuit, makes payments to persons who agree to serve as named plaintiffs while concealing such payments from the court. See *First Superseding Indictment*, United States v. Milberg Weiss Bershad & Schulman LLP, No. CR-05-587(A)-DDP (C.D. Cal. 2004).

145. See Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

146. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

147. STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 362–64 (2002); 1 JAMES D. COX & THOMAS LEE HAZEN, *CORPORATIONS* 476–82, 515–17 (2d ed. 2003).

using threat of liability to induce diligent management and preventing fear of liability from overdetering desirable wealth-generating activities.<sup>148</sup>

Delaware law perpetually searches for equilibrium. A brief experiment with giving sharp teeth to the obligation to exercise due care in the management of a firm led quickly to a major retrenchment in the law.<sup>149</sup> A combination of doctrine and statute—the almost abstention-like business judgment rule and laws permitting exculpation and indemnification of officers and directors for failure to exercise due care—has created conditions in which liability for breach of the duty of care is practically nonexistent.<sup>150</sup> Breaches of the duty of loyalty, meanwhile, have generally been limited to instances of self-dealing.<sup>151</sup>

Delaware thus leaves itself in a situation in which its fiduciary duty law arguably does little to deter even very bad management of firms, unless hortative judicial statements substantially influence behavior.<sup>152</sup> Delaware law seems to supply a three-step recipe for directors to insulate themselves from liability: First, adopt exculpation and indemnification provisions and practices in corporate charters and employment relationships; second, go through any motions required by Delaware case law to ensure that the protections of the business judgment rule will apply (for example, making a record that directors met and discussed the relevant things before rendering a decision); and, third, refrain from looting the corporation.<sup>153</sup>

However, there is also the issue of good faith. Chancellor William Allen's opinion in *In re Caremark International Inc. Derivative Litigation*<sup>154</sup> was the first

148. See BAINBRIDGE, *supra* note 147, at 242; COX & HAZEN, *supra* note 147, at 487.

149. *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

150. DEL. CODE ANN. Tit. 8, §§ 102(b)(7), 145 (2001 & Supp. 2009); BAINBRIDGE, *supra* note 147, at 241–51; COX & HAZEN, *supra* note 147, at 482–84; see also Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 95 (2004) (“[T]he whole point of the business judgment rule is to prevent courts from even asking the question: did the board breach its duty of care?”); Geoffrey P. Miller, *A Modest Proposal for Fixing Delaware's Broken Duty of Care* (New York Univ. Sch. of Law, NYU Ctr. for Law, Econ. & Organization, Law & Econ. Research Paper Series, Working Paper No. 09-41, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1495029](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495029).

151. See *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167–72 (Del. 1995); *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939); BAINBRIDGE, *supra* note 147, at 306; COX & HAZEN, *supra* note 147, at 517.

152. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997).

153. Delaware courts often have specified procedures that directors may follow to avoid liability for breach of fiduciary duty. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180–85 (Del. 1986); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955–58 (Del. 1985); see also BAINBRIDGE, *supra* note 147, at 277 (stating that the *Van Gorkom* decision provides a “procedural roadmap” for corporate decisions of large magnitude); Lynn A. Stout, *In Praise of Procedure: An Economic and Behavioral Defense of Smith v. Van Gorkom and the Business Judgment Rule*, 96 NW. U. L. REV. 675 (2002) (exploring the idea of enforcing the duty of due care through procedural requirements).

154. 698 A.2d 959 (Del. Ch. 1996).

important deployment in Delaware law of the concept of good faith as a solution to balancing problems in the law of corporate governance. Chancellor Allen broadened directors' duties to supervise internal compliance efforts within firms but reduced the risk of overdetering valuable business endeavors by limiting enforcement to cases of bad faith failure to monitor.<sup>155</sup>

The claim in the *Caremark* lawsuit was that the directors failed to prevent healthcare fraud violations that led to a criminal settlement naming the firm.<sup>156</sup> In approving settlement of the shareholder lawsuit, Chancellor Allen explained that directors have a fiduciary duty to monitor for law violations but are insulated from liability for failure to monitor and prevent illegal acts as long as they make a "good faith effort to be informed and to exercise appropriate judgment" in fulfilling their "duty of attention."<sup>157</sup> The "duty of attention" is a duty "to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists."<sup>158</sup> Vacuous monitoring systems designed only to insulate directors from liability would not satisfy the obligation of good faith.<sup>159</sup> Effective oversight is required, but—to avoid the judicial second-guessing of business judgments that was seen as the costly error of the decision in *Smith v. Van Gorkom*—liability will be imposed only for "systematic and sustained failure to address compliance," not for negligence or even gross negligence.<sup>160</sup>

Shortly before *Caremark*, the Delaware Supreme Court had said that corporate fiduciary duties consist of "the triads of . . . good faith, loyalty or due care."<sup>161</sup>

155. Jennifer Arlen, *The Story of Allis-Chalmers, Caremark, and Stone: Directors' Evolving Duty to Monitor*, in CORPORATE LAW STORIES 323, 326 (J. Mark Ramseyer ed., 2009).

156. *Caremark*, 698 A.2d at 960–68.

157. *Id.* at 968.

158. *Id.* at 970.

159. See, e.g., *McGowan v. Ferro*, 859 A.2d 1012, 1031–38 (Del. Ch. 2004) (reciting directors' shareholder-regarding reasons for extensions to a merger agreement as the basis for rejecting plaintiffs' claims that the directors extended the agreement in bad faith); *In re Gaylord Container Corp. Shareholders Litig.*, 753 A.2d 462, 477–79 (Del. Ch. 2000) (finding that the board acted in good faith in defensive response to takeover efforts because deliberative procedures involved genuine effort to evaluate proposals in an informed manner and on their merits); *Emerald Partners v. Berlin*, No. Civ.A. 9700, 2003 WL 21003437, at \*41 (Del. Ch. Apr. 28, 2003) (same). Note the parallel here to the law of corporate criminal liability, which usually refuses to insulate a corporation from sanctions for the acts of its agents simply because the corporation had a policy against criminal wrongdoing. See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1005–07 (9th Cir. 1972).

160. Arlen, *supra* note 155, at 325–26.

161. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1994), *modified*, 636 A.2d 956 (Del. 1994); see also *Malone v. Brincat*, 722 A.2d 5, 10–11 (Del. 1998) (stating that corporate fiduciaries have a duty of honesty to shareholders that arises from the duties of loyalty, care, and good faith); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989) (stating that the presumption of the business judgment rule can be overcome if the plaintiff produces evidence of self-interest, self-dealing, lack of good faith, or failure to exercise due care); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955–57 (Del. 1985) (holding that for a defensive measure in response to a takeover bid to be protected

For more than ten years, there ensued a busy narrative about good faith in the Delaware courts' decisions. A parsimonious explanation of why this occurred might be that the Delaware legislature chose to use the term in statutes providing that exculpation and indemnification are not permissible for conduct that is not in good faith.<sup>162</sup> But Delaware decisions on good faith have not focused on these statutory provisions as much as on common law of fiduciary duty. In addition, even given the statutory provisions, the courts faced the remaining question of how to define conduct that is not in good faith.

In *Stone v. Ritter*,<sup>163</sup> the court settled good faith's status in Delaware. *Stone* attracted notice because the court explicitly abandoned its "triad" language and formally situated the duty of good faith within the duty of care.<sup>164</sup> But the court's more substantive move in *Stone* was to adopt Chancellor Allen's work in *Caremark* by connecting the duty of good faith to the duty of attention to internal corporate monitoring and explaining what a bad faith breach would look like. The directors in *Stone* were held to have acted in good faith in discharging their duty of attention because the procedures they employed in monitoring a bank's compliance with laundering laws were genuine, not mere window dressing.<sup>165</sup> The *Stone* court stressed that the good faith inquiry is subjective, with a claim of breach requiring "a showing that the directors knew that they were not discharging their fiduciary obligations" and were "demonstrating a conscious disregard for their responsibilities."<sup>166</sup>

The Delaware Supreme Court's other recent decision on good faith, *Lyondell Chemical Co. v. Ryan*,<sup>167</sup> addressed a claim that directors violated their obligation of good faith in failing to obtain the best price in a sale of the corporation. The court rejected the claim with the following logic: A violation of the duty of good faith is established only if directors "knowingly and completely failed to undertake their responsibilities" by disregarding a known duty to act. Delaware precedent governing sale of a firm does not require directors to take any particular steps in obtaining the best price; therefore, the directors could not

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by the business judgment rule, directors must have been "motivated by a good faith concern for the welfare of the corporation and its stockholders" and must have been disinterested and have acted with due care).

162. DEL. CODE ANN. tit. 8, §§ 102(b)(7), 145 (2001).

163. 911 A.2d 362, 365–70 (Del. 2006).

164. *Id.* at 370.

165. *Id.* at 371–73.

166. *Id.* at 370; see also *Ryan v. Gifford*, 918 A.2d 341, 357–58 (Del. Ch. 2007) (holding that claims that directors approved misleading backdating of stock-option grants could constitute a breach of the duty of good faith because directors were alleged to have intentionally participated in a practice that misled shareholders).

167. 970 A.2d 235 (Del. 2009).

have breached the duty of good faith by failing to do the things plaintiffs said they should have done.<sup>168</sup>

The meaning of *Stone* and *Lyondell* is plain. A violation of the duty of good faith requires disregard of an underlying legal obligation with a culpable mental state that includes at least knowledge of that obligation. Because the underlying duty in the *Stone/Caremark* context—the duty to monitor for violations of the law—is relatively clear (thanks to Chancellor Allen), it is possible to identify a failure to monitor involving knowing or intentional disregard of the obligation. But since the duty in the *Lyondell*/takeover context is much less clear—there are many permissible ways for directors to handle a sale of the firm under Delaware law—it is much more difficult, and maybe impossible, to identify bad faith in that context.

The famous litigation over executive compensation involving the Walt Disney Corporation might fall somewhere between the *Stone* and *Lyondell* scenarios. In *In re Walt Disney Co. Derivative Litigation*, the Delaware Supreme Court addressed a shareholder action complaining about approval of an extravagant compensation arrangement including a golden parachute.<sup>169</sup> The court said that failures to act in good faith fall into three categories: “subjective bad faith,” that is, fiduciary conduct motivated by an actual intent to do harm” (actionable); “fiduciary action taken solely by reason of gross negligence and without any malevolent intent” (not actionable); and a middle category of “intentional dereliction of duty, a conscious disregard for one’s responsibilities” (actionable).<sup>170</sup> Although the court did not reach this conclusion, one might have said that the conduct of the Disney directors belonged in the middle category. The argument would be that, in conducting a formalistic review of a compensation proposal they never had any thought of rejecting, the directors were not pursuing procedures designed to protect shareholder interests but were acting only to insulate themselves from liability. That conduct, undertaken with that mental state, would be a conscious, bad faith dereliction of a duty.<sup>171</sup>

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168. *Id.* at 239–43 (citing and discussing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986)).

169. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006).

170. *Id.* at 64–66.

171. See Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010) (arguing that lack of good faith is the mental state required for a violation of the duty of loyalty). An argument against a subjective conception of good faith in corporate law might be that such an approach leaves out many cases of managerial self-deception that harm shareholders. See Deborah A. DeMott, *Puzzles and Parables: Defining Good Faith in the MBO Context*, 25 WAKE FOREST L. REV. 15, 22–23 (1990); Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 22–23 (2006). This is a persuasive point to the extent that one believes that a duty of good faith should expand the range of managerial actions subject to liability under the duties of care

The story of good faith in Delaware corporate law is about a kind of evasion. On one hand, imposition of fiduciary duties on corporate management is seen as essential for the protection (and therefore solicitation) of investors' capital. On the other hand, important policy objectives demand that legal regulation afford wide discretion to primary actors. These objectives include the desire to encourage risk-taking that generates wealth and Delaware's desire to achieve or maintain its position in the political economy of corporate law.<sup>172</sup> Wide discretion for the performance of duties leaves the law of fiduciary duty vulnerable to abuse. It may become easy to say one is obeying the law, or to act as if one is, when one in fact is doing so superficially, in disregard of substantive obligations, and solely to avoid the prospect of judicial review.<sup>173</sup>

Good faith doctrine seeks to identify at least some of the instances in which directors pursue this subversive approach to the fiduciary duty regime. If good faith imposed a new set of substantive obligations, it would destroy the space for discretion that corporate law requires.<sup>174</sup> This prospect of violence to the Delaware regime was raised by the courts' talk about a "triad" of fiduciary duties and a wave of ensuing scholarship<sup>175</sup> and responses<sup>176</sup> on the meaning of a "new"

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and loyalty. If the duty of good faith should only fortify the duties of care and loyalty, then subjectivity of the inquiry should be a lesser concern.

172. See, e.g., Timothy P. Glynn, *Delaware's Vantage Point: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91 (2008); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005); Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491 (2005).

173. See Arlen, *supra* note 155, at 339 (reporting that Chancellor Allen has explained that he was motivated in *Caremark* by a concern that directors had been lulled into passivity and complacency by the business judgment rule).

174. See Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 488–89 (2004) (explaining that, without distinguishing deliberate or egregious duty of care violations from ones that are merely grossly negligent, good faith duty could present the same problems as the ruling in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985)).

175. Claire Moore Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm*, 22 FLA. ST. U. L. REV. 955 (1995); Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211 (2006); Eisenberg, *supra* note 171; Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833 (2007); Elizabeth A. Nowicki, *A Director's Good Faith*, 55 BUFF. L. REV. 457 (2007); Elizabeth A. Nowicki, *Not In Good Faith*, 60 SMU L. REV. 441 (2007); David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491 (2004); Sale, *supra* note 174; Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719 (2007).

176. Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559 (2008); Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 1131 (2006). For an earlier take on good faith under Delaware law, see John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989). For examinations of good faith leaning more positive than normative, see Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1 (2005), and DeMott, *supra* note 171.

duty of good faith. *Stone* and *Lyondell*, and their embrace of *Caremark*, are a choice by the Delaware courts to make clear that good faith is not a duty but an ancillary tool that fortifies background law. Good faith doctrine does this by permitting judicial review and sanction of management conduct designed to exploit the business judgment rule in pursuit of conduct known to be contrary to settled duties.

#### IV. WHEN IS EVASION WORTH A RESPONSE?

The natural question is whether the preceding discussion, and further considerations of a theoretical nature, yield insight about when the effort to contend with evasion will be worthwhile. This is a question of cost-benefit analysis. My objective in this final Part is to provide a conceptual framework for that analysis. The question whether the anti-evasion game is worth the candle is fundamentally contextual. Answers will vary with certain characteristics of fields of law.

Legal fields are diverse along two dimensions that, when combined, supply a useful four-square rubric for considering the question of whether to chase evasion. The first dimension is the extent to which a regime's normative underpinnings are strong and recognizable. Consider the non-legal context of games. Some games are played with an attitude of all is fair in love and war. In ice hockey, for example, the norm is to expect and not condemn a sharp elbow deployed when the referee is not looking. Other games are played with the expectation that players will comport themselves within the spirit of the rules. In golf, for example, even players contending for very large prizes at the highest levels enforce picayune rule violations on themselves.<sup>177</sup>

Likewise, some legal regimes have strong and clear normative underpinnings and count on actors displaying a certain fealty to those underpinnings. Others do not. For example, Mark Tushnet has considered the significance of "constitutional workarounds": legislators' or executive branch officials' efforts to use technically lawful structures to transgress the facial terms of constitutional provisions.<sup>178</sup> (An example might be the way in which former Senator Hillary Clinton was appointed secretary of state without, it was thought,

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177. Recently, extraordinary charges of "cheating" were lodged against a top player who discovered a loophole in a new rule banning a longstanding feature of clubs deemed to have made it too easy to impart spin to the golf ball. See Larry Dorman, *Phil Mickelson Accused of Cheating at Torrey Pines*, N.Y. TIMES, Jan. 30, 2010, at D5.

178. Tushnet, *supra* note 4.

violating the Emoluments Clause.)<sup>179</sup> Tushnet concludes that the more there is consensus that the “workaround” does not violate the values underlying the relevant constitutional provision as applied to the contemporary context, the less problematic such efforts should be.<sup>180</sup> This approach to identifying conduct that is not unwanted evasion because it does not violate underlying norms obviously depends on both the existence of those norms and the legal system’s ability to identify them.<sup>181</sup>

A second dimension on which legal regimes vary is their complexity and the corresponding resources of the actors they govern. Evasion is a potentially big problem for environmental law but not much of one for the law of murder.<sup>182</sup> In environmental regulation, the law is so ramified that loopholes may be abundant, and many of the persons and entities controlled by law have the assets, the professional assistance, and the economic motive to exploit deficits in the law.<sup>183</sup> Not so in the law of homicide, which leaves little space for planning how to kill another human being without violating the letter of the law.

There is some, but not nearly full, overlap between these two dimensions of normative strength and complexity. Sometimes a legal regime will be highly complex, in whole or in part, because it lacks a clear normative foundation. But this is not inevitable. Thus, it will be useful to divide legal regimes, for purposes of discussing the evasion problem, into four categories: those with strong norms and low complexity (the law of murder, for example); those with weak norms and low complexity (for example, some prohibitions on

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179. Stephanie Mencimer, *The Birthers’ Next Target: Hillary Clinton*, MOTHER JONES, Feb. 16, 2010, available at <http://motherjones.com/politics/2010/02/birthers'-next-target-hillary-clinton>.

180. Tushnet, *supra* note 4, at 1510–11. An instructive example might be the recent litigation over a cross on federal land in the Mojave Desert. The Supreme Court concluded (barely, in a fractured decision) that the government may have acted lawfully in transferring a small amount of land under the cross to a private party after a federal court had enjoined the government from displaying the cross under the Establishment Clause. *Salazar v. Buono*, 130 S. Ct. 1803, 1815–21 (2010). The Court said the lower court erred in deeming the statutory land transfer an “evasion” of its injunction. Surely it would be evasion, though, were Congress to grant a small plot in the middle of every national park to a private organization that proceeded to erect a large cross on each plot.

181. Cf. Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 264 (2009) (arguing that principles-based regulation is more appropriate in “interpretive communities” in which regulators and regulated parties share understandings such that principles have the same meaning for all).

182. I hasten to remind the reader that by “evasion” I mean the reshaping of behavior to avoid the terms of sanctioning rules, not ex post and ex ante efforts to avoid detection, such as destruction of evidence or non-creation of evidence (donning gloves before committing a crime, for example). See Avraham D. Tabbach, *The Social Desirability of Punishment Avoidance*, 25 J. L. ECON. & ORG. 265 (2010) (exploring regulation of such avoidance efforts and arguing that incentives for actors to engage in avoidance can enhance deterrence by raising the costs of law violations).

183. For a recent exploration of some of the complexities in the project of regulating behaviors that damage the environment, see David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223.

common nuisance activities); those with weak norms and high complexity (for example, many aspects of federal tax law); and those with strong norms and high complexity (some white-collar criminal law, for example). In each category, we will see possibilities for variation according to two criteria: How worrisome is evasion? And how tractable is it?

Before exploring these four types of fields, I will explain that my normative perspective is, for two reasons, consequentialist. First, the problem of interest here is a practical problem of law design that follows, as a secondary matter, from a primary decision to subject conduct to legal sanction. Even if that primary decision has non-consequentialist justification, the problem of how to implement a decision to sanction is substantially consequentialist.<sup>184</sup>

The willingness to devote resources to evasion of the law marks one as a greater social threat. This is at least true with respect to an actor's probable past and future conduct.<sup>185</sup> It might also be true with regard to present conduct, in the sense that the actor's efforts at evasion make it more likely that she will succeed in imposing the relevant harm on others without being stopped by early intervention of the law.

The problem of the actor who alters behavior *ex ante* to avoid legal sanction is somewhat like the problem of the actor who eliminates or conceals evidence *ex post* in order to avoid legal sanction.<sup>186</sup> In economic terms, the evader is lowering the probability that sanctions will be imposed and thus lowering expected sanctions; this undermines deterrence. The actor who redesigns behavior *ex ante* has the potential of being more worrisome than the actor who covers up *ex post* because, in some contexts at least, the intellectual costs of strategic planning will be far lower than the more tangible costs of, for example, disposing of evidence.

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184. If a state's justification for punishing murder is to see that all murderers receive their moral desert, the problem of how to prevent murderers from escaping deserved sanction is instrumental. This is true even if one's deontological commitments would lead one to the (extraordinary) position that the state should pursue punishment of all murders without regard to considerations of cost.

185. Similar reasoning lies behind practices in criminal law, such as punishing actors who attempt crimes without completing all steps necessary to their commission and who conspire with others to commit offenses, and punishing recidivists more severely.

186. Although finding that considerations of cost complicate the question of how to proceed, consequentialist analyses of the problem of "detection avoidance" have agreed that legal regimes must contend with efforts to defeat sanction. See Jacob Nussim & Avraham D. Tabbach, *Controlling Avoidance: Ex Ante Regulation Versus Ex Post Punishment*, 4 REV. L. & ECON. 45 (2008); Jacob Nussim & Avraham D. Tabbach, *Deterrence and Avoidance*, 29 INT'L REV. L. & ECON. 314 (2009); Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331 (2006); Tabbach, *supra* note 182. A major emphasis of this literature has been on the need to consider ways in which avoidance efforts may raise costs for actors and therefore affect, if you will, both sides of the deterrence ledger.

The consequentialist case for anti-evasion doctrines, though still contingent on cost-benefit analysis, grows stronger as one considers how the conduct of evasive actors might affect the conduct of others. Evasion necessarily includes thinking about the law, what it seeks to accomplish, and choosing to press forward in spite of the state's effort to prevent that conduct. Persons' decisions to take action in the face of legal prohibitions can erode general compliance with the law, which may increase the incidence of undesirable acts by others.<sup>187</sup> A person without any particular tendency to want to work around the law might perceive that others—perhaps those with advantages in resources and sophistication—are “gaming the system” or “getting away with” something and therefore feel foolish for refraining from conduct for legal reasons.

There is a very different view. In a daring new paper, Leo Katz argues that loopholes should not bother us at all because they are a virtual force of nature that is impossible to prevent, and he says Arrow's theorem proves it.<sup>188</sup> Katz's point is that the loophole in a legal regulation is like the third option that can change the outcome when multiple voters participate in a Condorcet system of decisionmaking: Three judges ranking alternatives A, B, and C against each other could produce a three-way tie, even though two of the three judges prefer B to C.<sup>189</sup> Inclusion of a third option (A) seems to have thwarted the will of the majority of the voting body in some disturbing way. But Arrow's theorem and related work hold that this cannot be avoided.<sup>190</sup>

Katz argues that loopholes work the same way. His simplest example, he says, is self-defense in homicide.<sup>191</sup> An actor's alternatives, given the right facts, are (A) to retreat, (B) to be killed, or (C) to kill. Society ranks these A first, B second, and C third: We prefer the actor to retreat; if he does not do so, he must be killed and does not have the option to kill. But if A is removed (because retreat is not an available option), C is preferred to B: The actor is permitted to kill and will not be punished for doing so. Katz thinks this is just like the voting paradox. The introduction of the “irrelevant” third alternative of retreat changes the law's preferred outcome between two alternatives. His

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187. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 73–80 (2003); see also HART, *supra* note 1, at 198 (“‘Sanctions’ are . . . required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall.”).

188. Leo Katz, *A Theory of Loopholes*, 39 J. LEGAL STUD. 1 (2010).

189. *Id.* at 15.

190. This occurs if, between B and C, judges X and Y prefer B to C and judge Z prefers C to B. Then, when third option A is introduced, judge X ranks her preferences A, B, C; judge Y ranks hers B, C, A; and judge Z ranks hers C, A, B. Before the inclusion of A, B won over C with two-thirds of the votes. With A in the vote, A, B, and C each garner one first-place vote, one second-place vote, and one third-place vote. See *id.* at 14.

191. *Id.* at 19–22.

normative point is that the inevitability of these situations in legal decisionmaking makes loopholing behavior unobjectionable. If the actor manages to maneuver himself into a situation in which retreat is not an option so that he can kill, he has every right to kill, and we cannot condemn him for it.

Katz's account is oddly stripped of any reference to law's normative underpinnings—maybe deliberately so because his story cannot work when we consider, as we must, the normative structure of law. Voting rules and a deeply normative doctrine like the use of deadly force in self-defense bear little similarity to one another. The problem of Arrow's theorem may be an unavoidable cost of using certain voting systems that are preferable to the alternatives. But the actor who manipulates self-defense doctrine to produce authorization to kill a human being is a genuine worry that we ought to try to do something about. Indeed, self-defense doctrine typically states that the defense will be unavailable to one who contrives to create the circumstances of his own peril. Engineering lack of retreat would seem to fit that rule. We might still have difficulty distinguishing the manipulators from those who, in good faith, find themselves without means of retreat. But that is not sufficient reason to abandon the effort. All Katz has done is to highlight the importance of what I intend to discuss in the remaining pages: that the desirability and feasibility of pursuing evasion will vary by legal context, oftentimes depending on whether the regulatory structure in question instantiates strong normative concerns.

The second reason to confine the inquiry in this last Part to consequentialist considerations is that the potential deontological case for sanctioning purposeful evaders of the law is intriguing but complicated. Making the case would require full-dress theoretical treatment stretching this project beyond sensible boundaries. One would have to enter major debates over the relationship between the individual and authority, and over obligations to obey the law.<sup>192</sup> The present Article will make progress even if it only illuminates the instrumental case for whether and how to respond to law evasion.

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192. See, e.g., Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 774–77 (2006) (briefly summarizing major views in this discussion); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769 (2010) (same); Leslie Green, *Legal Obligation and Authority*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 29, 2003), <http://plato.stanford.edu/entries/legal-obligation> (providing a more detailed summary and a bibliography of the major views). Katz argues that there is often nothing amiss from a deontological viewpoint in deliberately refashioning a norm-violating behavior to accomplish the same result without violating the formal terms of the norm. LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 1–132 (1996). But see Larry Alexander, *Is Morality Like the Tax Code?*, 95 MICH. L. REV. 1839, 1843–46 (1997) (arguing that Katz fails to establish that moral norms frequently have formal features that, if complied with, render an actor's conduct non-blameworthy even if the actor's mental state and the result of the actor's conduct suggest the actor merits blame).

### A. Strong Norms, Low Complexity

Some areas of law do not confront serious problems of evasion, as distinct from the general problem of efforts to obstruct the detection and sanctioning of violations. An obvious example is the law of murder, which cannot really be evaded. One who wishes to cause the death of another human being will, to succeed, have to engage in some conduct that will in fact cause that person's death. There is no opportunity to alter one's actions to avoid the terms of the rule defining the illegal conduct. One who desires a death that she causes also cannot avoid satisfying the mental-state component of the rule against murder. In other words, once one thinks about how to kill without being a murderer, one is already on an irreversible path to being a murderer if one goes through with it. Exceptions to this proposition will be relatively rare.

The reason that a field of law like this does not generate space for evasion is that it is simple, and its normative foundation is crystal clear. Everyone knows what murder is, and everyone knows that it is seriously wrong. In these conditions, it is easy to articulate rules that coincide with the matter of social concern that prompts regulation. The positive contours of law fit neatly with law's objectives, leaving little room for actors to design conduct that implicates those objectives without transgressing the letter of the law.

### B. Weak Norms, Low Complexity

Fields of law that are characterized by weak or unclear norms and low complexity would seem to be of low concern in terms of evasion. Two types of regimes would fit in this category: broad ones and narrow ones. A body of law might be simple without strong normative footings just because a decision has been made to regulate in an overbroad manner. To echo Hart a bit, legislators concerned about a mildly annoying tendency of minors to chew tobacco in the park might adopt a ban on all minors in the park.<sup>193</sup> As long as the lines are sharp between a minor and an adult and between inside and outside of the park, the ban leaves little space for evasion.

Or a body of law might be simple without strong normative foundation because a decision has been made to legislate narrowly in view of only light concern about the particular problem. Lawmakers might ban spitting in the park, knowing that youths are likely to respond by using their soda cans as spittoons while continuing to chew in the park. Legislators might be content to let that

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193. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

go, in view of the weak normative concern motivating the project. What is it exactly that is annoying about the minors' conduct? To which other behaviors might that same concern apply? Can those behaviors be specified without simply creating new and equally concerning behaviors? Sometimes such questions will not be worth addressing if only a mild annoyance provoked law's involvement in the first place.

In the first of these situations—weak norms, low complexity, broad law—evasion is not practically possible. In the second—weak norms, low complexity, narrow law—evasion may or may not be possible, but it is not a serious normative concern.

### C. Weak Norms, High Complexity

Consider regimes that lack clear normative underpinnings and are highly complex. In such contexts, the evasion problem may be both common and exceedingly difficult to tackle. Inability to identify normative reference points means that evasion and compliance may be indistinguishable. To return to a point emphasized in Part II, one cannot know and intend that one's planned course of technically compliant conduct subvert the objectives of a legal regime unless those objectives are visible *and* are independent of the technical contours of the regime.

The difficulty extends beyond the possibility for formation of the operative mental state. It also increases the risk of false positives in the enforcement and adjudication processes. If legal actors cannot clearly ascertain the underlying purposes of a legal regime, they will not be able to identify those primary actors whose projects subvert the purposes of the regime. This may lead to mistaking actors who are carefully working to comply with the letter of the law for evaders of the law who ought to be sanctioned.

False positive errors potentially impose several costs. They could deter welcome activities by making actors fearful of engaging in some conduct that complies with the letter of the law and is not harmful or otherwise undesirable. They could lead to punishment of actors who do not deserve it because they did not choose to engage in conduct that is normatively wrongful. Such errors could also perversely undermine legitimacy of law by conveying the message that the law will penalize even responsible compliance.

While a legal regime's weak normative foundations increase risk of error, high complexity produces abundant opportunities for evasion. Law tends to be complex in sectors of social activity in which regulated actors are sophisticated and highly resourceful. (Complex law tends to follow technological complexity, which requires resources to produce—as in industries like

pharmaceutical production or software design.) Complexity thus heightens worry about evasion even as low normative clarity warns that the evasion problem may be intractable.

Given this tension, one should expect fields in which normative clarity is low and complexity is high to be unsettled with regard to the treatment of evasion. Tax law may be a good example. The field is famously complex; the point needs no argument even outside an audience of lawyers. Tax law's normative underpinnings are elusive. What is the obligation imposed on the citizen by modern taxation schemes? Many would say the duty is simply to follow the rules—to pay what one lawfully owes and not a penny more, while refraining from cheating. At most, the obligation could be construed as having to pay one's equitable share. But tax law codifies neither "equity" nor anything like it. What constitutes one's fair share is determined solely by what the rules deem to be one's liabilities.

Not surprisingly, tax law is beset with problems of evasion, yet lacks satisfying doctrinal devices for combating it.<sup>194</sup> Responding to the "plague" of recent tax shelter technologies, courts and scholars have worked to fashion doctrines that echo the kind of good faith inquiries I have explored here.<sup>195</sup> Some approaches would resolve questions of lawfulness with reference to the legislative purpose behind a relevant aspect of the tax regime, while others would employ indirect means of smoking out actors who employ devices only for purposes of evasion.<sup>196</sup> Whether these approaches gain traction in slowing the advance of tax shelters may indicate whether evasion control is possible in conditions of high complexity and low normative clarity. I defer to the tax scholars, but I am somewhat pessimistic in view of the difficulty of identifying the underlying norm that is violated by conduct skirting the tax laws.

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194. See Walter J. Blum, *Motive, Intent, and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485, 515 (1967) ("It clearly would be foolish to attempt to define tax avoidance as merely a more intense or pervasive version of tax minimization."); Stuart P. Green, *What Is Wrong With Tax Evasion?*, 9 HOUS. BUS. & TAX L.J. 221 (2009) (discussing the difficulty of drawing the line between tax evasion and tax avoidance). Tax law has tried doctrines like "form versus substance" and "step transactions" that authorize courts to impose liability if an actor structured conduct to comply in literal terms with the code but to accomplish ends equivalent to those barred by, and motivating, the rules. BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATE AND GIFTS* ¶ 4.3 (3d ed. 1999 & Supp. 2009). One way for tax law to attack evasion is to say that a transaction must be done with a non-tax purpose in order to count as non-taxable and then to attempt to police the genuineness of taxpayers' asserted non-tax motives. See, e.g., *United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 94–97 (2d Cir. 1983).

195. Chirelstein & Zelenak, *supra* note 129, at 1939.

196. See *id.*; Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation: A Much Needed Purposive Approach*, 2009 U. ILL. L. REV. 697; Leandra Lederman, *W(h)ither Economic Substance?*, 95 IOWA L. REV. 389 (2010).

Another example, perhaps more disputable, in the area of high complexity and low normative clarity is the byzantine disclosure regime of the Securities Act of 1933 and its rules. The normative foundation of the regime is determinate only at a high level: to supply the potential investor in a securities offering with the amount and type of information that is likely to produce an informed, sober decision. The statutes accordingly place very broad restrictions on the seller's freedom to communicate with the investor.<sup>197</sup> Because the statutory restrictions are highly overbroad, the accompanying regulations create abundant exceptions that permit written and oral communications.<sup>198</sup> But these safe harbors run on for dozens of pages and are often picayune and arbitrary. The complexity of this regime, coupled with the lack of normative specificity about what sort of disclosure is really right for the investor, may mean that there is no productive and cost-effective way to deal with evasion other than to continually update the elaborate rules.<sup>199</sup>

#### D. Strong Norms, High Complexity

Of greater promise and interest are fields involving strong norms and high complexity. Here is the heart of the evasion problem. Complexity breeds evasion, and strong norms produce abundant motivation to do something about it. Strong norms also make evasion more tractable.

The question of whether efforts to combat evasion are worthwhile turns on a cost-benefit analysis that, to repeat, should be most concerned with risk of false positives. Sanctioning evaders may produce overdeterrence and excessive penalties if the effort leads to sanctioning persons who are not engaging in behaviors that implicate the purposes of a legal regime. The clearer the norms supporting a legal regime, the clearer will be the regime's purposes to primary actors considering whether evasive behavior is appropriate and to legal actors considering whether behaviors of primary actors implicate the regime.

The difference between evasion and compliance is recognizable when legal objectives are clear. Suppose a regime designed to keep water supplies healthy lists known harmful substances that are unlawful to discharge. Plant Manager 1

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197. 15 U.S.C. §§ 77b, e (2006).

198. 17 C.F.R. §§ 230.134–174 (2009).

199. It is curious that the 1933 Act's rules contain provisions that purport to contradict this point. See, e.g., *id.* § 230.168 *prelim. n.1* ("This [safe harbor] is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of [the Securities Act of 1933]."). One wonders how the SEC would identify a scheme that complies with the letter of the rules but is nonetheless a scheme to evade, given an underlying legal regime as elaborate, and in places arbitrary, as the rules about what does and does not constitute "gun jumping" in issuing new securities.

studies the new law and then alters her chemical process to produce non-listed substance Q, a new harmful effluent, in order to continue dumping without being sanctioned. Manager 1 has undermined the legal regime. Plant Manager 2 tests her effluent daily, in part to see if she is violating the law. She discovers one day that Q, which she has been dumping since well before the passage of the law, is harmful. She studies the law, sees that Q is non-listed, and chooses to continue dumping it unless and until the law changes. Manager 2 has appropriately complied with the law.

Neither case violates the letter of the law, and both produce the harm the regime is attempting to prevent. Both are of potential concern to the project of environmental regulation. Manager 1, however, is of greater concern. She devoted resources and determination to contravening, or exempting herself from, the decision that society made through the lawmaking process about how to treat harmful dumping. Manager 2 produced the same harm to the environment, but she did not set out to contravene or exempt herself from the decision to shut down harmful dumping. A person of Manager 2's orientation is less likely, *ex ante*, than a person of Manager 1's orientation to produce conduct that undermines the regime. She is also less likely to engage in similar efforts in the future.<sup>200</sup>

One can distinguish between the actors in this example because the regime has a clear purpose: to keep drinking water safe. Of course I am assuming the existence of such a purpose for the sake of argument, but it is not outlandish to expect that many legal regimes will have clear purposes. This is even more likely to be the case in the kinds of regimes that have been the subject of this study. If a lawmaking body goes to the effort of creating an anti-evasion component in a legal regime—by, for example, adopting a broad prohibition but affording a good faith defense, or coupling detailed rules with a prohibition on bad faith efforts to evade them—that body is more likely to express the purpose of the regime in the course of doing so.

Legal regimes characterized by strong norms and high complexity include some of those governing corporate management and persons engaged in more sophisticated forms of white-collar crime. Corporate directors, for example, are supposed to further shareholder interests by working to prevent corporate managers from breaking the law. This is a clear, strong, and overriding legal norm. But internal monitoring in large corporate organizations is highly complex. Evasion can be identified as conduct that exploits the complexity of

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200. This is because Manager 1 is willing not just to pollute but also to devote resources to finding new ways to do so that undermine legal controls. Manager 1 is a more determined, creative violator who is less constrained by a sense of normative obligation to the law.

the monitoring task as a means of shirking the fundamental duty to monitor meaningfully and effectively.<sup>201</sup> Similarly, financial advisors are supposed to refrain from harming their clients by deceiving them. This is also a clear, strong, and overriding legal norm, which is complicated by the complexity of modern investment products. Evasion can be identified as conduct that exploits the complexity of financial products as a means of circumventing the fundamental duty not to mislead the client into purchasing a product with an excessive and undisclosed level of risk.

A single field can contain subfields that vary along the two dimensions of normative clarity and complexity. Aspects of corporate disclosure regulation, as noted, are both complex and opaque with reference to overriding norms. Aspects of fiduciary obligation are simpler and not nearly so normatively debatable. Some parts of corporate regulation fall somewhere in between. For example, Jennifer Arlen and Eric Talley have argued that efforts to bar or control common takeover defenses could be ineffective because a firm could deploy alternative measures to evade such efforts, principally by embedding change-of-control provisions in contracts with third parties.<sup>202</sup> This would succeed, they argue, because courts are not competent to differentiate between the use of such contracts to evade regulation of takeover defenses from their use for ordinary and welcome economic purposes.<sup>203</sup> If this proved true, it probably would be because the law has to grant business managers such wide freedom to make contracting decisions. The activity of day-to-day management decisions in modern corporations is far too complex for de novo review by judicial actors to be feasible.

#### E. How Should Doctrine Look?

If evasion is both worrying and potentially tractable, then one ought to consider—again from the perspective of cost-benefit analysis—the most promising means of attacking it. The question of doctrinal design has both substantive and evidentiary components. One should ask exactly what legal actors should look for in identifying evasion. In addition, one should ask how to allocate burdens of proof in that process.

Mental-state inquiry is the most promising method for identifying evasion in view of cost-benefit considerations. Consider two ways of specifying

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201. See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

202. Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Shareholder Choice*, 152 U. PA. L. REV. 577 (2003).

203. *Id.* at 624–25.

undesirable evasion of a legal regime. One would be to ask whether or not, all things considered, an instance of conduct violates the spirit of the law without transgressing its letter. The other would be to use the method advocated in this Article: to ask whether or not an actor who engaged in an instance of conduct knew and intended that her conduct would violate the purpose of the law as a means of accomplishing her goals.

The first method risks mirroring one of the more problematic strategies for dealing with evasion I identified at the outset: selecting overbroad laws and counting on enforcers and adjudicators to apply them in the right cases. This is the same as asking whether a case merits sanction in light of the overall purposes of the law. The second method narrows inquiry to those actors who planned around the law. The method's subjective focus lowers the risk of sanctioning actors whose conduct does not in fact constitute undesirable evasion.

There are, of course, costs associated with following subjective mental state as the path to identifying evasion. All mental-state inquiries are underinclusive because of their inferential nature. Actors may not leave sufficient evidence to permit conclusions *ex post* about what they were thinking at the time of their conduct. To the extent actors are aware that legal inquiry focuses on mental state, actors may learn to thwart the anti-evasion doctrine itself by taking steps to reduce the availability of such evidence.<sup>204</sup> Devices like good faith and bad faith doctrines will produce false negatives.

The question of whether one should be more concerned about false positives (because evasion inquiry will sanction non-evasive actors) or about false negatives (because a narrower anti-evasion doctrine will fail to identify evasive actors) is an empirical problem that depends on legal context. An important aspect of legal context is undoubtedly the nature of the sanctions that may follow from identification of an actor as an evader.

Consider the problem of regulating police conduct, as well as other official actions, mentioned at the outset of this Article. Officials' evasion of the constraints of public law is a matter of enduring concern. But the law of qualified immunity has explicitly abandoned subjective inquiry into the good faith of officials sued for civil rights violations.<sup>205</sup> Even scholars who worry a great deal

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204. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–34 (1984) (providing a theoretical framework for considering divergence, or lack thereof, between what legal rules say to primary actors versus legal actors); Sanchirico, *supra* note 186, at 1366–72 (describing the problem of recursion in sanctioning obstruction of justice).

205. JOHN C. JEFFRIES, JR. ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 86–130 (2000). Qualified immunity is a doctrine that grants limited protection to public officials against liability for official actions in order to balance competing demands of sufficient accountability against overdetering the performance of public functions. See *Harlow v. Fitzgerald*, 457 U.S. 800, 814–15 (1982).

about controlling police power have expressed skepticism about resting Fourth Amendment inquiries on questions of whether officers engaged in purposeful manipulation of formal aspects of law.<sup>206</sup> Perhaps these turns in the law have been too hasty, and there is some promise in trying to identify and sanction the official who purposefully subverts the law. But it could be that the nature of the sanctions at stake in regulating government misconduct lowers concern about the costs of false positives and counsels in favor of broader and more objective tests for constitutional violations.

With criminal sanctions, given the strong liberty interests at stake, the balance may weigh in favor of an approach that steers clear of the risk of false positives at the cost of even widespread false negatives. Pursuing evasion through mental-state inquiry follows this path.

The criminal context also brings us to the question of burdens of proof. It might seem surprising that instead of supplementing narrow prohibitions with rules against acting in bad faith and making bad faith an offense element, the criminal law has supplemented broad prohibitions with rules supplying a “defense” to persons who act in good faith. This approach is more careful about false positives than it might appear. Good faith is not an affirmative defense in criminal law; it is merely a defensive argument. If a defendant describes the facts as consistent with her good faith, the prosecutor must (in order to prove an element like intent to defraud) prove her lack of good faith beyond a reasonable doubt. Thus, risk of error is skewed away from false positives.

Admittedly, there is an element of path dependence in this. Suppose we offered people a choice between a criminal law that banned ten specific deceptive practices plus “all similar conduct pursued in bad faith” and a criminal law that banned “all fraud” but excepted conduct pursued in good faith. From the standpoint of legality-related concerns, I would expect most people to be more comfortable with the latter approach than the former. That may be only because people are used to it. Thus, the question of whether anti-evasion doctrines should be expressed offensively (through a bad faith supplement) or defensively (through a good faith exception) may be less important than the question of how legal practice has come, or does come, to apply those doctrines on the ground.

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206. See, e.g., 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 1.4(a)–(e), at 115–35 (4th ed. 2004); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436–37 (1974).

### CONCLUSION

This Article has plowed new descriptive ground in two directions. First, evasion has been specified more generally and more clearly as a potential challenge for all projects of law design, including definition of crimes. The problem has been expressed as taking the form of actors both redesigning behavior and manipulating mental state. Second, the law's actual and potential use of mental-state inquiry as a vehicle for responding to evasion has been demonstrated in detail, especially in the context of previously undertheorized doctrines of good faith and bad faith.

The endeavor has also produced the beginnings of normative progress. The conclusions are as follows: Evasion is a special kind of consequentialist worry because it involves actors with heightened commitment to thwarting the objectives of legal regulation. Responding to evasion with doctrines designed to identify such actors promises to be more surgical than the alternatives of frequent rulemaking or the use of overbroad standards. Mental-state inquiry is, in turn, the most precise method for identifying actors who impose the special cost of evasion on legal regimes. Still, doctrine that locates evasion through mental state risks oversanctioning if deployed in fields characterized by low normative clarity and high complexity. Evasion control is both more urgent and more tractable in complex fields in which normative clarity is high. Therefore, some parts of corporate law and the law of white-collar crime could be improved with clearer and increased use of good faith inquiries designed to deal with evasion.